Circuit Court for Harford County
Case No. 12-C-17-000749

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 1746

September Term, 2021

MAYOR AND CITY COUNCIL OF HAVRE DE GRACE

v.

BARBARA PENSELL, *et al.*

Arthur,
Friedman,
Tang,

JJ.

Opinion by Tang, J.

Filed: August 5, 2025

*This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Rule 1-104(a)(2)(B).

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This appeal concerns two waterfront properties located at 150 and 211 Congress Avenue in the City of Havre de Grace. These properties are on opposite sides of Congress Avenue, a public road that runs west to east, ending at the Susquehanna River. At the eastern terminus of Congress Avenue, the City maintains a two-acre park, the Frank J. Hutchins Memorial Park (the "Park"). As detailed later, the City erected an event tent in the parking area of the Park to host various events. These events led to the legal disputes that are the subject of this appeal.

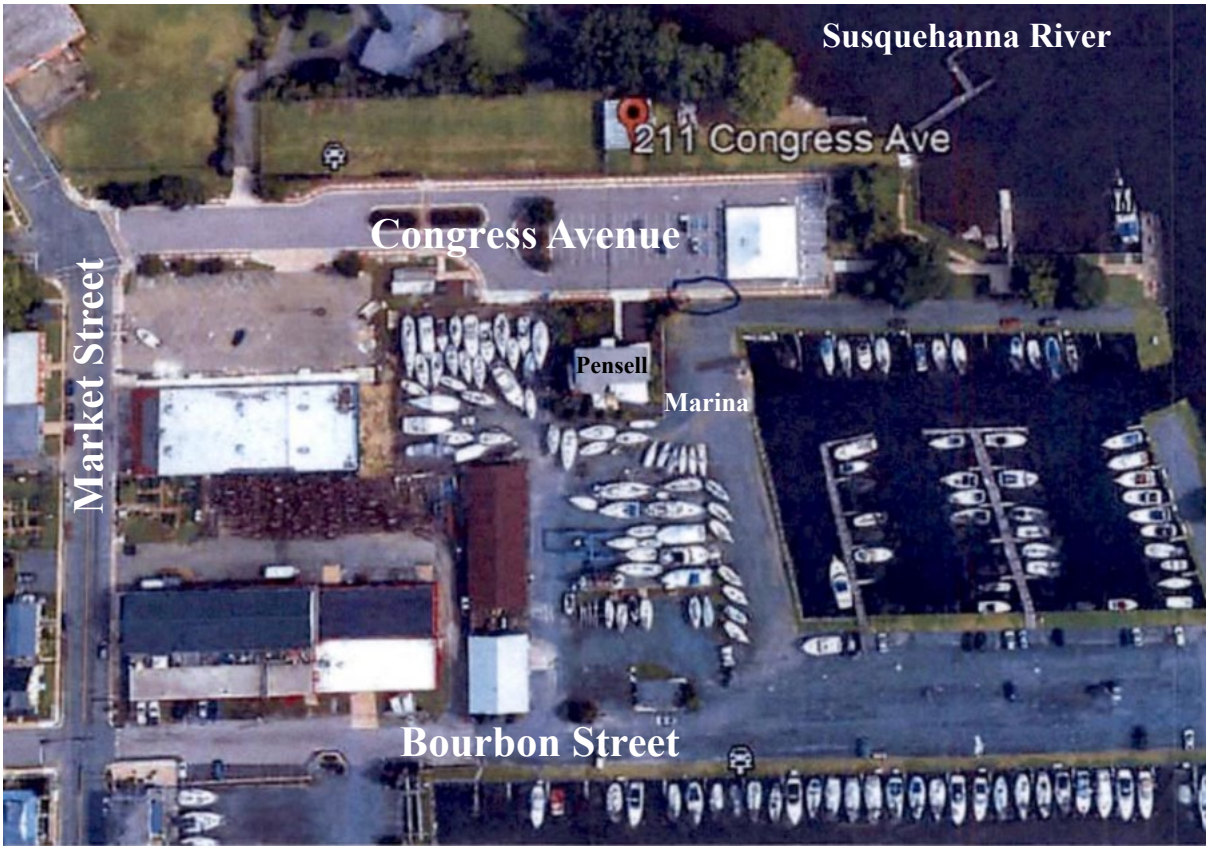
In 2010, Barbara and Gary Pensell purchased the lot at 150 Congress Avenue and built a home, where they have lived since 2012. The front of the house, which includes their garage and driveway, faces the parking area on Congress Avenue.

On the other side is 211 Congress Avenue. In 2014, 211 Congress, LLC ("211 Congress") purchased the property. 211 Congress is owned by Key Tidewater Ventures, a business entity owned by Robert Brandon and his wife. The property has a pier and a storage garage where Mr. Brandon stored his personal boats, but it remains otherwise undeveloped. Mr. Brandon considered using the property for commercial development related to boats. However, he ultimately decided that the only viable option for future development was to construct a single-family home.

A photograph of the area described is reproduced below and annotated for clarity:

Westbound Congress Avenue intersects with Market Street.[1] To the east of the Pensells' home is a marina. The Pensells own the property, and their son owns the marina business. The marina's main entrance is located on its south side along Bourbon Street, which runs parallel to Congress Avenue and intersects with Market Street. On the north side of the marina, between the Pensells' residence and the event tent, is an emergency gate that is typically locked and infrequently used. This gate leads to the parking area of Congress Avenue. A photograph of a wider view of the area described is reproduced below and annotated:

[1] Northbound Market Street becomes St. John Street.



The Pensells access public roads from their home primarily through their driveway, which leads out to Congress Avenue. They cannot drive a vehicle to the garage at the front of their house via Bourbon Street, unless they use the marina's emergency gate (circled in the above photograph), which is usually locked.

The property at 211 Congress Avenue is accessible through four gates in the chain link fence that runs along Congress Avenue. The storage garage is designated by the red and black dot in the photograph. The first two gates are located west of the storage garage, the third gate is in front of the garage, and the fourth is situated to its east. The third gate, which leads into the parking area of Congress Avenue, is the only gate that provides an

adequate turning radius for Mr. Brandon to maneuver a boat trailer and get his boat in and out of the garage.

PENSELLS' AND 211 CONGRESS'S COMPLAINT AGAINST THE CITY

The Pensells and 211 Congress complained that various events held at the Park since the installation of the tent in 2015 were excessively loud and hindered access to their properties. In 2017, they filed a four-count complaint against the City, the Mayor, and the City Council (collectively, the "City"), which was later amended (the "Complaint"). In the first two counts, 211 Congress claimed that the City had breached provisions in two agreements that ensure peaceful and quiet enjoyment of its property and access during special events. These agreements were part of a set of three that resolved a previous lawsuit between the City and 211 Congress's predecessors in interest. We will explain the origin of these agreements and their relevant provisions later. For now, we refer to these agreements as the "Amended Settlement & Boundary Line Agreement," the "Access Agreement," and the "Lease Agreement."

In Count I, 211 Congress alleged that the City breached a provision in the Lease Agreement that warranted peaceable and quiet enjoyment of 211 Congress Avenue. In Count II, 211 Congress alleged that the City breached a provision of the Access Agreement in which the City agreed that the owner of 211 Congress Avenue would have pedestrian and vehicular access to the property during any special events held on Congress Avenue.

The last two counts were for public and private nuisance. In Count III, the Pensells and 211 Congress alleged that the City created a public nuisance by allowing large and

loud events to take place at the foot of Congress Avenue. They claimed that this unreasonably interfered with the rights of the community. In Count IV, the Pensells alleged that the City created a private nuisance due to noise, crowds, and road closures associated with various events, which unreasonably interfered with their use and enjoyment of their property.

CITY'S COUNTERCLAIM AGAINST 211 CONGRESS

In response to the claims made by 211 Congress in Counts I and II of the Complaint, the City filed a counterclaim, later amended, seeking declaratory judgments across five counts (the "Counterclaim").

The basis for two of these counts in the Counterclaim was that the agreements cited by 211 Congress in the Complaint were invalid, and therefore, the City could not have breached their provisions. Below is a summary of the allegations in these two counts:

- The City sought a declaration that both the Amended Settlement & Boundary Line Agreement and the Access Agreement were *ultra vires* and thus void *ab initio* because the City had not approved the agreements (Count V of the Counterclaim).
- The City sought a declaration that the Lease Agreement was *ultra vires* and void *ab initio*. According to the City, the City Council had been given inaccurate information before approving the Lease Agreement, and Resolution 2003-1, which documented its approval, had not been attested by the Director of Administration (Count VI of the Counterclaim).

The City sought a declaration that, assuming the Access Agreement was valid, it nonetheless did not guarantee 211 Congress any specific access point to its property (Count IV of the Counterclaim). Instead, it required only that the City provide general pedestrian and vehicular access to the property.

The City also sought a declaration that, assuming the Lease Agreement was valid, its terms prohibited the prior owner of 211 Congress Avenue from assigning the lease to 211 Congress without first obtaining the City's consent. Because the lease was assigned to 211 Congress without the City's consent, the City asserted that the assignment was void (Count I of the Counterclaim).

Finally, the City sought a declaration regarding the applicability of City Zoning Code § 205-3(E) (Count III of the Counterclaim). As explained later, this provision provides that single-family detached dwellings built on lots created by deed or subdivision plat recorded in Harford County's land records before March 15, 1982, are exempt from the setback requirements. Specifically, the City sought a declaration that 211 Congress Avenue is not exempt from the City's zoning setback requirements for new single-family homes. Alternatively, the City sought a declaration that part of the property qualifies for the setback exemption, while the remainder does not. If this relief were granted, it would limit 211 Congress's ability to construct a single-family dwelling on the property, as envisioned by Mr. Brandon.

OVERVIEW OF THE CIRCUIT COURT'S DECISION

Before trial, the circuit court granted summary judgment in favor of 211 Congress on Count III of the Counterclaim concerning the zoning setback exemption. It declared that 211 Congress's property was exempt from the setback requirements under § 205-3(E).

A seven-day bench trial on the parties' other claims commenced July 26, 2021. The relevant evidence will be summarized in the discussion as necessary. For now, we outline

the court's December 14, 2021 "Order for Permanent Injunction and Declaratory Judgment," which addressed each of the outstanding claims in the Complaint and Counterclaim.

The court ruled in favor of the Pensells on their private nuisance claim (Count IV of the Complaint) and granted them a permanent injunction limiting the City's use of the Park. However, it denied the Pensells' and 211 Congress's claim of public nuisance (Count III of the Complaint).

The court denied the City's request for a declaration that both the Amended Settlement & Boundary Line Agreement and Access Agreement were invalid (Count V of the Counterclaim), and it declared that these agreements were not *ultra vires* or void *ab initio*.

The court denied the City's request for a declaration that the Lease Agreement was invalid (Count VI of the Counterclaim) and declared that the Lease Agreement was not *ultra vires*. It also denied the City's request for a declaration that the assignment of the Lease Agreement to 211 Congress by its predecessor-in-interest was invalid (Count I of the Counterclaim). The court declared that the predecessor's assignment of the Lease Agreement to 211 Congress did not require City approval, as the agreement unambiguously stated it "runs with the land."

The court denied 211 Congress's claims for breach of the Lease Agreement and breach of the Access Agreement (Counts I and II of the Complaint, respectively). The court found no substantial interference with the business entity of 211 Congress; there was no

evidence to suggest that 211 Congress had attempted to carry on any business activity on the unoccupied property. In its written order, the court concluded that there was "no justiciable issue."

Regarding the City's request for a declaration that the Access Agreement did not guarantee 211 Congress a specific access point to its property (Count IV of the Counterclaim), the court determined that there was no actual controversy between the City and 211 Congress. This was because there was no evidence that 211 Congress, as an entity, conducted any business on or otherwise occupied the property.

The City noted a timely appeal, and the Pensells and 211 Congress each cross-appealed.

ISSUES PRESENTED

On appeal, the City presents the following issues, which we have rephrased and reorganized for clarity: [2]

[2] The City phrases the issues in its brief as follows:

1. Was the trial judge legally incorrect when he issued a permanent injunction against the City by applying a subjective standard for private nuisance? [Count IV of the Complaint]
2. Did the trial [c]ourt err by concluding the Agreements were not *ultra vires* and *void ab initio* because they did not involve a conveyance of an interest in public property and did not otherwise violate the Charter? [Counts V and VI of the Counterclaim]
3. Did the trial [c]ourt err in concluding the Lease was unambiguous and did not require prior Council approval for assignment because it "runs with the land"? [Count I of the Counterclaim]
4. Was the trial court legally incorrect when it applied a zoning setback exemption (City Code 205-3E) to the "area added by fill" recorded in

(a) Did the trial court err in finding that the City's use of the Park constituted a private nuisance and issuing a permanent injunction against the City and in favor of the Pensells (Count IV of the Complaint)?

(b) Did the trial court err in declaring that both the Amended Settlement & Boundary Line Agreement and the Access Agreement were not *ultra vires* acts, rendering them void *ab initio* (Count V of the Counterclaim)?

(c) Did the trial court err in declaring that the Lease Agreement was not an *ultra vires* act, rendering it void *ab initio* (Count VI of the Counterclaim)?

(d) Did the trial court err in declaring that the assignment of the Lease Agreement to 211 Congress did not require prior City approval (Count I of the Counterclaim)?

(e) Did the trial court err in granting summary judgment in favor of 211 Congress and declaring that its property is exempt from the setback exemption under the City's Zoning Code § 205-3(E) (Count III of the Counterclaim)?

The Pensells and 211 Congress present the following issue on cross-appeal, which we have rephrased:[3]

2003 when no other documents delineating the Asher Property boundaries were recorded in the land records prior to March 15, 1982, other than the 1962 Deed? [Count III of the Counterclaim]

The City does not challenge the court's decision on Count IV of the Counterclaim. Therefore, we will not discuss it further in this opinion.

[3] The Pensells phrase the issues in their brief as follows:

1. Whether the trial court's Final Judgment correctly enjoined certain events and amplified noise in Hutchins Park as a private nuisance under Maryland law when the Pensells were denied access to their property and subjected to loud disturbances as a result of the events in and around the Tent?

2. Whether the trial court committed error by finding that the Tent and associated events did not constitute a public nuisance when the evidence was undisputed that the events had public impact and that the Pensells and 211 Congress suffered injuries distinct from the general public?

(f) Did the trial court err in finding that the City's use of the Park did not constitute a public nuisance (Count III of the Complaint)?

211 Congress presents one more issue on cross-appeal, which we have rephrased:[4]

(g) Did the trial court err in concluding that no justiciable controversy existed as to 211 Congress's breach of contract claims (Counts I and II of the Complaint)?

Regarding issue (a), we hold that the circuit court did not err in finding that the events hosted by the City constituted a private nuisance and that the Pensells were therefore entitled to a permanent injunction. However, some provisions of the injunction were overly

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The first issue is not a separate issue. Rather, the Pensells rephrase the first issue raised in the City's brief. *See supra* n.2. The second issue, however, is a separate issue raised on cross-appeal.

[4] 211 Congress phrases the issues in its brief as follows:

1. Did the Circuit Court correctly conclude that the agreements between the City and 211 Congress' predecessor in interest were valid and not *ultra vires*?
2. Did the Circuit Court correctly conclude the City's lease of property to 211 Congress' predecessor in interest unambiguously "runs with the land"?
3. Did the Circuit Court correctly conclude on summary judgment that the Property qualified for a setback exemption under the City Zoning Code?
4. Did the Circuit Court erroneously conclude that no justiciable controversy existed as to 211 Congress' breach of contract claims?
5. Did the Circuit Court erroneously conclude that the City's use of the Park did not constitute a public nuisance?

The first three issues are not separate issues but rather a restatement of the last three issues raised in the City's brief. *See supra* n.2. The fifth issue overlaps with the second issue raised in the Pensells' cross-appeal. *See supra* n.3. The fourth issue, however, is a separate one raised on cross-appeal.

broad. Accordingly, we reverse in part, vacate in part, and remand the case for the court to modify these provisions in accordance with this opinion.

Regarding issue (b), we hold that the circuit court erred in concluding that the Access Agreement was not an *ultra vires* act, rendering it void *ab initio*. Accordingly, we reverse in part and remand the case for the court to declare that the Access Agreement was an *ultra vires* act and thus void *ab initio*.

We affirm the court's decisions on all other issues.

STANDARDS OF REVIEW

In an action tried without a jury, the appellate court reviews the case "on both the law and the evidence" and "will not set aside the judgment of the trial court on the evidence unless clearly erroneous." Md. Rule 8-131(c). It also gives "due regard to the opportunity of the trial court to judge the credibility of the witnesses." *Id.*

We review the legal conclusions of the court *de novo*. *Thomas v. Cap. Med. Mgmt. Assocs., LLC*, 189 Md. App. 439, 453 (2009). Under this standard, we afford the trial court no deference, instead determining independently "whether the lower court's conclusions are 'legally correct.'" *Jackson v. 2109 Brandywine, LLC*, 180 Md. App. 535, 567 (2008) (citation omitted).

However, the appellate court reviews a trial court's factual findings for clear error. *Dynacorp Ltd. v. Aramtel Ltd.*, 208 Md. App. 403, 451 (2012). "If any competent material evidence exists in support of the trial court's factual findings, those findings cannot be held to be clearly erroneous." *Collins/Snoops Assocs., Inc. v. CJF, LLC*, 190 Md. App. 146, 160

(2010) (citation omitted). As we summarize the relevant evidence, we do so in the light most favorable to the prevailing party and resolve all evidentiary conflicts in the prevailing party's favor. *Dynacorp Ltd.*, 208 Md. App. at 451.

DISCUSSION

Due to the multitude of issues, some of which overlap, we organize the discussion into three sections. In Section I (Nuisance), we address issues (a) and (f). In Section II (Agreements), we address issues (b), (c), (d), and (g). In Section III (Zoning Setback Exemption), we address issue (e).

I.

NUISANCE

Nuisances are classified as either public or private. A private nuisance is defined as "a non trespassory invasion of another's interest in the private use and enjoyment of land." *Rosenblatt v. Exxon Co., U.S.A.*, 335 Md. 58, 80 (1994) (quoting Restatement (Second) of Torts § 821D (1965)). "Nuisance is not confined to physical intrusions onto another's property; rather, it broadly encompasses all tangible invasions, including noise, odor, and light." *Blue Ink, Ltd. v. Two Farms, Inc.*, 218 Md. App. 77, 92 (2014).

To recover for private nuisance, "a plaintiff must demonstrate that the defendant's interference with the plaintiff's property rights is both unreasonable and substantial." *Id.* at 92–93. "The nuisance must, in the judgment of reasonable individuals, create a condition that is 'naturally productive of actual physical discomfort to persons of ordinary sensibilities, tastes, and habits' and, in light of the circumstances, is 'unreasonable and in

derogation of the rights of the party.'" *Id.* at 93–94 (citation omitted). "[I]t is not enough if a particular plaintiff is offended or annoyed if he is peculiarly sensitive." *Schuman v. Greenbelt Homes, Inc.*, 212 Md. App. 451, 470 (2013) (citation and quotations omitted). Thus, "[a] finding of private nuisance requires a two-part analysis: (1) viewing the defendant's activity, was the interference unreasonable and substantial? and (2) viewing the plaintiff's alleged harm, was the inconvenience or harm caused by the interference objectively reasonable?" *Blue Ink, Ltd.*, 218 Md. App. at 94. Thus, a finding of nuisance involves "a balance of the competing property interests at stake." *Id.* at 93 (citation omitted).

In contrast to private nuisance, public nuisance is "an unreasonable interference with a right common to the general public." *Tadjer v. Montgomery Cnty.*, 300 Md. 539, 552 (1984) (quoting Restatement (Second) of Torts § 821B (1979)). "Circumstances that may sustain a holding that an interference with a public right is unreasonable" include the following:

> (a) *[w]hether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience*, or
>
> (b) whether the conduct is proscribed by a statute, ordinance or administrative regulation, or
>
> (c) whether the conduct is of a continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right.

Restatement (Second) of Torts § 821B (1979) (emphasis added).

"Conduct does not become a public nuisance merely because it interferes with the use and enjoyment of land by a large number of persons. There must be some interference with a public right. A public right is one common to all members of the general public." *Id.* § 821B cmt. g. The Restatement provides the following illustration:

> [T]he pollution of a stream that merely deprives fifty or a hundred lower riparian owners of the use of the water for purposes connected with their land does not for that reason alone become a public nuisance. If, however, the pollution prevents the use of a public bathing beach or kills the fish in a navigable stream and so deprives all members of the community of the right to fish, it becomes a public nuisance.

Id.

"A public nuisance is a criminal offense involving an interference with the community at large[.]" *Rosenblatt*, 335 Md. at 79 n.8. However, a private person may seek an injunction against the offender if the person "owns property injured by the nuisance" and "has suffered from it some special and particular damage, different not merely in degree, but different in kind, from that experienced in common with other citizens." *Hoffman v. United Iron & Metal Co., Inc.*, 108 Md. App. 117, 135 n.9 (1996) (citations omitted).

A.

Pensells' Private Nuisance Claim

The Pensells' claim against the City was for private nuisance "in fact" as opposed to a nuisance *per se*. "A nuisance *per se* is an act, occupation, or structure which is a nuisance at all times and under any circumstances regardless of location or surroundings." *Adams v. Comm'rs of Trappe*, 204 Md. 165, 170 (1954). In contrast, "[a] nuisance in fact

is an act, occupation, or structure, not a nuisance *per se*, but one which becomes a nuisance by reason of the circumstances, location, or surroundings." *Id.*

1.

Relevant Background

We summarize the relevant evidence adduced at trial. In mid-July 2015, the City erected an event tent in the Park at the foot of Congress Avenue, approximately eighty feet from the Pensells' house. The City organized numerous events under and around the tent, including farmers' markets, Oysterfests, Oktoberfests, Thursday "Nite" Live concerts, and Fourth of July celebrations.

The Pensells, who typically spend their winters in Florida, expressed concern multiple times to City officials regarding these seasonal events, which took place between May and November. Specifically, the Pensells expressed concern about maintaining vehicular access to their property for themselves, their family, and their guests. As for noise, the Pensells complained that amplified music played during various events at the Park was excessively loud and caused them to leave their home until the events were over. Additionally, visitors attending various events entered the Pensells' property, sat on their front steps, littered, used it as a bathroom, and damaged the property. The Pensells were also concerned about large crowds consuming alcohol in a small area. According to Mrs. Pensell, the City seemed unwilling to address the concerns they had raised. Instead, the City insisted that the events would continue despite the Pensells' objections.

The Pensells recognized that "[l]iving where we live, we expect to have varied events at our front door from time to time, and that is fine with us." For example, Mrs. Pensell supported "water-oriented things" like the youth sailing school, which did not cause excessive noise or access problems. The youth sailing school operated for a few weeks during the summer, accommodating thirty to fifty participants under the tent. Other such non-disruptive events included a yearly fundraiser, visits from historic vessels like the Pride of Baltimore, Jazz by the Bay, Bike to Work Day, Maritime Museum Shrimpfest, and the Susquehanna Hose Company Crab Feast.

However, the Pensells objected to events that "overpower this space and impose an unreasonable burden" on them. Examples of events that interfered with the enjoyment of their property, including hindering their vehicular access to and from their home and creating excessive noise, are summarized below.

a. Farmers' Markets

Between 2015 and 2020, the City hosted farmers' markets in the Park every Saturday from May to November, from 7:30 a.m. to noon. At first, the vendors were situated under an event tent, which did not create access issues for the Pensells.

However, in 2020, due to the COVID-19 pandemic, the City removed the tent and spread the vendors out along the street. This new arrangement blocked the Pensells' vehicular access to and from their garage. On one occasion, they coordinated with the police to exit their driveway, and the police directed them onto the street. For continued

access, the Pensells had to arrange with the police each time they wanted vehicular access to and from the front of their home.

In 2021, the City re-erected the tent but still permitted vendors to set up on the street, which continued to obstruct vehicular access to and from the Pensells' residence. In April 2021, before the start of trial in July, the City informed the Pensells that it would close the streets to vehicular traffic every Saturday between May 1 and December 18, from 7:30 a.m. to noon, at the entrance of the Park. This closure amounted to thirty-three Saturdays of restricted vehicular access to and from the Pensells' driveway.

b. Oysterfest

On September 20, 2015, the City hosted Oysterfest, the first major event under the tent. The event featured musical performances on a stage set up under the tent, facing Market Street, in the same general direction as the Pensells' residence. Two bands performed consecutively for five hours. Mrs. Pensell testified about the noise level from the bands, stating, "[W]hen you're in the house, you can't read a book. You can't watch the news. You can't do anything except withstand it." After about three hours, the Pensells left their house and started driving around town, waiting for the music to stop.

c. Oktoberfest

Between 2015 and 2019, the City held Oktoberfest at the Park every October. The event was not held in October 2020 due to the COVID-19 pandemic. The first Oktoberfest in the Park took place on October 17, 2015, and reportedly drew more than 3,000 attendees.

The Pensells expressed concerns that the large crowds at these events disrupted their use of their home.

Mrs. Pensell testified that she and her husband left their home during the Oktoberfest events because the amplified noise from the bands that played facing their house made it "too uncomfortable to be there." She further testified that access to their garage was blocked during these events because vendors were set up in front of their house and because the City closed Congress Avenue at Market Street. As a result of these obstructions, the Pensells were unable to access their property by car for nine to twelve hours at a time. To gain vehicular access to Market Street, they had to make arrangements with the City or call the police for assistance.

d. Thursday "Nite" Live Concerts

In 2016, the City hosted about two to three concerts each month between June and September. In 2017, concerts were also held, but there were fewer than in the previous year. The Pensells left their home during these performances, sometimes riding around town, sitting in another park, spending the night elsewhere, or adjusting their vacation start dates to avoid the events. Vehicular access to their home was also blocked during the concerts. At some point, the City decided to move these concerts to other venues; however, it did not guarantee that future events would not be held at the Park.

On August 11, 2016, the Pensells had a noise expert, Tracy Seymour, measure the volume levels both inside and outside their home during one of the Thursday night concerts. The event, which was scheduled from 6 p.m. to 10 p.m., featured a KISS cover

band that played amplified music. According to Mrs. Pensell, who was present during the event, the windows of their home shook at times during the performance.

Ms. Seymour testified about the measurements she took both inside and outside of the Pensells' home during the performance. She explained that a decibel is a unit used to measure sound levels based on the way the human ear perceives them. A decibel scale operates on a logarithmic base ten scale, which means that an increase of ten decibels corresponds to a perceived doubling in volume to the human ear.

To illustrate, sixty decibels is about the standard volume of human speech. Seventy decibels would be comparable to the sound of machinery or being some distance away from a highway or an airplane passing by. Eighty decibels would be like what one might experience living near a major highway for example, at a residence near Interstate 95. Ninety decibels would be the equivalent of standing next to a motorcycle.

Ms. Seymour testified that prolonged exposure to noise levels around seventy decibels for more than eight hours could begin to cause hearing damage. Damage can occur after shorter exposures, such as two to four hours, at higher levels, like eighty decibels.

Ms. Seymour took seven decibel readings during the performance at various locations on the Pensells' property. The first measurement was on the screened-in patio at the back of the house, which recorded seventy-nine decibels. The second measurement was taken along the boat docks, between the property fence and the boats, approximately twenty-five feet from the fence line, and measured eighty-one decibels. The third measurement, also taken along the boat docks, next to the boat lift, and about sixty-two

feet from the fence line, measured seventy-eight decibels. The fourth measurement was taken inside the house, with all windows and doors closed, and measured fifty-eight decibels. Ms. Seymour explained that the indoor measurement of fifty-eight decibels was higher than the expected range of forty to fifty decibels for indoor noise during active daytime hours. It was also above the twenty to thirty decibels expected during sleeping hours.

The fifth measurement, taken in the front yard, about halfway between the street and the house, measured seventy-nine decibels. The sixth measurement was taken at the same location in the front yard later during the performance, and it also measured seventy-nine decibels. The final measurement, taken along the boat docks approximately 166 feet from the fence line, measured seventy-two decibels.

Ms. Seymour opined that the decibel readings were considered loud and exceeded the threshold that can impact the human ear. She further opined that exposure to noise levels above this threshold can negatively impact sleep and concentration. She suggested ways to alleviate the noise levels during performances. These measures included limiting the concert times, reconfiguring the band setup so that the band and speakers faced away from the residence, and covering the sides of the residence with dense materials to reduce noise. She also suggested installing a wood fence about six to eight feet high, using dense wood slats with no gaps, and/or hanging acoustical blankets along the fence line, which would provide a similar effect to the wood fence. Additionally, she suggested soundproofing the interior of the home with acoustical treatments for the windows.

Although sound measurements were only recorded during one performance, Mrs. Pensell testified that the City hosted another concert in the tent that was even louder than the KISS cover band. In correspondence to the Mayor, the Pensells stated that the concert on September 8, 2016, was "so loud it literally rattled our windows."

The City's sound expert, Christopher Karner, reviewed Ms. Seymour's report and noted that it was missing details that hindered a full peer review. Nevertheless, he assumed her measurements were accurate and concluded that the noise outside was loud, while inside it was moderate. He further concluded that levels recorded would be loud enough to disrupt typical speech outside, but not inside, and that it would not be loud enough to damage hearing either inside or outside.

e. Fourth of July Celebrations

From 2017 to 2021, the City hosted a Fourth of July concert at the Park as part of its larger Independence Day festivities, except in 2020 when the event was canceled due to the pandemic. During these celebrations at the Park, amplified music was played, and crowds gathered to watch the fireworks display. Concert performances took place from 7 p.m. to 9 p.m., followed by a fireworks display. To facilitate these events, the City closed off Congress Avenue at Market Street.

Before 2017, the City held a multi-day carnival at another venue in conjunction with the Fourth of July festivities. Although plans were once made to host the carnival at the Park, they never materialized.

The Pensells usually left their home during these celebrations to avoid noise and access issues. In 2017, they left for several days to escape "the spectacle that the event could turn into." The Pensells expressed concerns about safety and trespassing, noting that on one occasion, they returned home after a celebration to find a broken glass pane.

f. Other Events & Installations

Other events held in the Park resulted in the closure of Congress Avenue, affecting the Pensells' vehicular access to their property. These events included the Food Truck Festival in 2018, where vendors set up food trucks along Congress Avenue, as well as the Waterfront Festivals in 2016 and 2019.

During the winters of 2015 and 2016, the City removed the tent and replaced it with an ice rink, although this practice did not continue afterward. The Pensells expressed concerns that the ice rink attracted large crowds, generated excessive noise, and emitted bright lights. However, they were typically not present during this time of year, as they generally stayed in Florida from October or November until April.

2.

Circuit Court's Rulings

On August 3, 2021, the circuit court delivered its oral ruling. It found that the Pensells proved a private nuisance, citing obstructed ingress and egress to the front of their home and excessive noise during musical performances. The court found that certain events held at the Park had "unfavorably impacted the Pensells' right of ingress and egress to the

property on a number of occasions." The court also found that the noise level, particularly the concerts held at the Park, was too loud and offensive.

The court found Mrs. Pensell's testimony credible, as she described how the house shook due to the noise and the "very substantial" noise levels during specific events. Although the court considered her testimony alone to be sufficient, the court also found the testimony of the Pensells' sound expert persuasive. Based on the evidence, the court determined that some of the events in the Park produced "loud, unjustified, [and] disturbing noise."

Regarding the inconvenience and harm suffered by the Pensells, the court rejected the City's suggestion that the Pensells could use another way to access their property by vehicle through the entrance adjoining the marina. The court found this suggestion impractical, stating, "[The Pensells are] entitled to go in their front door. And also, when they have guests or family members, that would not be a reasonable expectation."

Concerning the noise, the court credited Mrs. Pensell's testimony and concluded that the noise levels rendered their living situation "very unlivable" and described it as "a total and unjustifiable racket." The court also found that there was "material damage" to the value of the Pensells' property based on their expert's testimony that they would have had to install various physical measures to mitigate the noise.

The court granted a permanent injunction against the City to remedy the private nuisance that had been inflicted on the Pensells. First, the court stated that it was not going to order the removal of the event tent because it serves purposes beyond the disputed

events. For instance, it is also used for a youth sailing school, which the Pensells did not oppose.

The court did, however, enjoin the City from hosting Thursday "Nite" Live events and any other concerts featuring "amplified music," stating that holding such concerts "so close to the Pensells' home is unreasonable." The court ordered that, beginning in 2022, the only concert permitted in the Park would be the Independence Day concert. The reason was twofold: first, the Pensells were not present during this event, and second, the Independence Day celebration is a marquee event for the City. The court reasoned, "It's very important to the City and they spread it out over several parks. So I find on that one occasion the concern associated, and other activities, with Independence Day is appropriate."

The court also granted injunctive relief as to Oktoberfest events. It explained: "I just think, from the photographs I've seen, too many individuals in too small an area blocked access." The court also expressed concern that, despite the City's intention to move Oktoberfest to another venue, the City might later decide to relocate that event back to the Park. Thus, it ordered the City to hold Oktoberfest in a different location beginning in 2022.

The court granted additional injunctive relief with respect to the farmers' markets, stating that the market operates on Saturdays for seven months each year. The court reasoned that the City was unable to control where vendors set up within the market, which interfered with the Pensells' enjoyment of their property.

Regarding other events, the court found no unreasonable interference resulted from the ice rink, Oysterfests, or Waterfront Festival, provided there was no "amplified music." However, the court prohibited any future carnival from being held in the Park because it "would be too much in too small an area."

In paragraph 3 of the Order for Permanent Injunction and Declaratory Judgment, entered December 14, 2021, the court set forth the following provisions:

> (a) ORDERED, that beginning on January 1, 2022, a Permanent Injunction be and is hereby issued against [the City], enjoining any use or approval of any special events by the [City] of Hutchins Park and Congress Avenue that eliminates or materially restricts vehicular ingress and egress to or from the Pensells' property through their front driveway providing access to Congress Avenue through the Hutchins Park parking area, with the exception of the [City's] annual Independence Day Celebration. Such prohibited use includes but is not limited to the City Council's approval of special events hosted or conducted by third parties that result in the elimination or material restriction of vehicular access to or from the front driveway on the Pensells' property.
>
> (b) ORDERED, that beginning January 1, 2022, a Permanent Injunction be and is hereby issued against [the City], enjoining the City's conducting or approval of any special events at Hutchins Park that use amplified sound, with the exception of the [City's] annual Independence Day Celebration.
>
> (c) ORDERED, that beginning January 1, 2022, a Permanent Injunction be and is hereby issued against [the City], enjoining the use or approval of the following special events at Hutchins Park and Congress Avenue: the Farmers' Market, Oktoberfest, carnivals, and Thursday "Nite" Live concerts.
>
> (d) ORDERED, that a permanent injunction is denied with respect to the following additional injunctive relief requested by the Pensells:
>
> i. The [City] is not required to remove the Tent from its current location in Hutchins Park;
>
> ii. The [City] is not prohibited from approving special events that have properly issued alcohol permits so long as the other elements of injunctive relief granted herein related to noise and access are met.

iii. The [City] is not prohibited from approving events such as the Ice Rink or Waterfront Festival so long as the other elements of injunctive relief granted herein related to noise and access are met.

3.

Analysis

The City argues that the circuit court erred in granting a permanent injunction in the Pensells' favor based on a finding of private nuisance and that the terms of the permanent injunction are overly broad. According to the City, the court's finding of private nuisance concerning the excessive noise and access issues was not based on objective evidence, but rather on Mrs. Pensell's sensitivities and subjective belief that the disputed events should not take place in the Park.

Regarding the noise, the City asserts that there was no evidence of excessive noise from the farmers' markets or Oktoberfest. Other than the Thursday "Nite" Live concerts, which were eventually relocated, there were only about four musical events per year from 2017 to 2019. The City also argues that the only evidence of discomfort came from Mrs. Pensell's testimony regarding two concerts, for which sound measurements were recorded at only one event. While the highest sound level recorded outside was eighty-one decibels, it was only fifty-eight decibels inside the Pensells' home.

The City contends that the court's ruling reflected Mrs. Pensell's personal preference that the Park should not be used for specific events. It notes that the court did not enjoin the youth sailing program, which Mrs. Pensell supported, and the court's approval of the Independence Day concert, which coincided with the Pensells being away,

suggests that the court applied a subjective rather than an objective standard in its finding of private nuisance.

Similarly, regarding the Pensells' access issues, the City claims that the court considered the Pensells' "subjective assertions" of limited vehicular access to their property rather than the "objective" evidence available. The City maintains that the Pensells were not "objectively prevented" from accessing their property by car. The Park was closed to vehicular traffic only about twice a year, during events like Oktoberfest and the Independence Day concert, which meant the Pensells were inconvenienced in accessing their front driveway and garage for just a few hours each year. The City claims that during the farmers' markets, a designated lane was kept open for the Pensells' access. Additionally, the Pensells were able to call for police assistance if they encountered difficulties accessing their property by car. Furthermore, the court appeared to overlook that the Pensells had vehicular access to Bourbon Street through the marina abutting their property.

In sum, the City maintains that the events held at the Park were not so out of character, continuous, or unusual as to constitute an objective nuisance. Moreover, the City contends that the Pensells chose to live in a marina in downtown Havre de Grace rather than in a rural residential community and should thus expect certain inconveniences and discomforts.[5]

[5] We do not construe this point as an argument that the Pensells came to the nuisance. The City does make any argument to that effect.

a. The Circuit Court Did Not Err in Finding That the City's Use of the Park Constituted a Private Nuisance.

"To enjoin a nuisance on adjoining property, the landowner must show 'that the injury is of such a character as to materially diminish the value of his property and seriously interfere with the ordinary comfort and enjoyment of it.'" *Fantasy Valley Resort, Inc. v. Gaylord Fuel Corp.*, 92 Md. App. 267, 272 (1992) (citation omitted).

> The rule which must control is whether the nuisance complained of will or does produce such a condition of things as in the judgment of reasonable men is naturally productive of actual physical discomfort to persons of ordinary sensibilities, tastes, and habits, such as in view of the circumstances of the case is unreasonable and in derogation of the rights of the party subject to the qualification that it is not every inconvenience that will call forth the restraining power of a court. The injury must be of such a character as to diminish materially the value of the property as a dwelling and seriously interfere with the ordinary comfort and enjoyment of it.

Meadowbrook Swimming Club v. Albert, 173 Md. 641, 645 (1938) (citation omitted).

We disagree with the City's characterization of the interference experienced by the Pensells as isolated incidents. While the frequency of these interferences varied from year to year, the sum of the evidence established that the Pensells experienced ongoing issues with either restricted vehicular access to their property or excessive noise disturbances, or both, every year since the tent was erected in the summer of 2015 through the beginning of the trial in the summer of 2021.

After the tent was installed in 2015, the Pensells endured the loud amplified music from two bands performing for five hours during Oysterfest in September. Because it was impossible for them to read, watch the news, or engage in any activities other than enduring the noise, they left home after about three hours. During Oktoberfest, they were again

subjected to loud amplified music, which made it uncomfortable for them to stay at home. Additionally, their vehicular access to the property was blocked for twelve hours during this event.

In 2016, the Pensells experienced noise and access issues when the City hosted Thursday "Nite" Live concerts two to three times a month between June and September during the evening. During the KISS cover band performance, the noise levels outside the Pensells' home caused the windows to shake. Even inside their home, noise levels exceeded what would normally be expected for a sleep environment. Additionally, another performance at a different event was even louder than the KISS cover band concert. Based on these recordings, the court could reasonably have inferred that other concerts were likely just as loud. Although the City claimed that such events were no longer held at the Park, the court was unconvinced that the City would not reintroduce these events in the future.

After the Thursday "Nite" Live concerts ended in September, the Pensells experienced noise and vehicular access issues during Oktoberfest, when they were unable to access their property for twelve hours. That same month, they again experienced vehicular access problems during the Waterfront Festival that lasted nine hours.

In 2017, the City began hosting its Fourth of July celebrations in the Park, during which the Pensells experienced issues with noise and vehicular access to their home. They were unable to access their property for seven and a half hours. Access was also blocked during Thursday "Nite" Live events and two other concerts (Amish Outlaws on July 1 and Alternative Sanctions on September 22). Additionally, during Oktoberfest that year, the

Pensells faced excessive noise and access problems, resulting in their inability to reach the home by vehicle for twelve hours.

In 2018, the Pensells continued to encounter issues with access and excessive noise during the Fourth of July celebrations. Mrs. Pensell reported that during a concert in July, their vehicular access to and from their home was blocked for ten hours. The following day, a Food Truck Festival also restricted access for another six hours. During Oktoberfest that year, they experienced further excessive noise and vehicular access issues, being blocked from their home for another twelve hours.

In 2019, the City again hosted Fourth of July celebrations at the Park, which presented noise and vehicular access issues for the Pensells, whose vehicular access to their property was restricted for twelve hours. During the Waterfront Festival in October, vehicular access was blocked for nine hours. That same month, during Oktoberfest, the Pensells experienced more noise and access issues and were blocked from using their driveway for thirteen hours.

In 2020, the City canceled the Fourth of July celebration and Oktoberfest due to the pandemic. However, the Pensells experienced access issues caused by farmers' markets that year. Every Saturday from May to November, the City would close Congress Avenue and, to facilitate social distancing, vendors would set up in the street, blocking the Pensells' driveway from about 7:30 a.m. to noon in each instance.

In 2021, the City resumed the Fourth of July celebrations, which again presented noise and access issues for the Pensells. The City informed them that they would not have

vehicular access to their property via Congress Avenue from 3 p.m. to 11 p.m. on July 4. Additionally, the farmers' market vendors continued to obstruct the Pensells' driveway each Saturday from 7:30 a.m. to noon, starting in May and continuing through the beginning of trial in July.

In reviewing the evidence in the light most favorable to the Pensells, the prevailing party for this issue, we hold that the evidence summarized above supports the court's finding that access issues and excessive noise caused discomfort and annoyance to individuals of ordinary tastes, sensibilities, and habits. Additionally, the evidence supports the conclusion that the injury to the Pensells' property diminished its value as a residence and seriously interfered with the ordinary comfort and enjoyment of the home. Accordingly, the Pensells were entitled to injunctive relief. *See Bishop Processing Co. v. Davis*, 213 Md. 465, 473 (1957) ("To justify an injunction to restrain an existing or threatened nuisance to a dwellinghouse, the injury must be shown to be of such a character as to diminish materially the value of the property as a dwelling, and seriously interfere with the ordinary comfort and enjoyment of it." (quoting *Five Oaks Corp. v. Gathmann*, 190 Md. 348, 353 (1948))).

We disagree with the City's claim that the court relied on Mrs. Pensell's subjective views and preferences regarding certain events over others when determining that the disputed events constituted a private nuisance. The City relies on *Blue Ink, Ltd. v. Two Farms, Inc.*, 218 Md. App. 77 (2014), to support its assertion that the evidence was

insufficient to establish that the interferences from the events in the Park caused the Pensells objectively reasonable harm.

In *Blue Ink*, a drive-in movie theater sued its neighbor, a gas station owner, for private nuisance, among other allegations. 218 Md. App. at 83–84. The theater required darkness to operate, and the owner complained that the artificial light from the gas station interfered with the viewing experience for his customers. *Id.* at 85. This Court held that the evidence presented at trial was insufficient to support a finding that the gas station's lighting was unreasonable and substantial, noting that it was "typical and ordinary" and was "not aimed or directed or oriented towards the [complaining] drive-in." *Id.* at 94.

We explained that the "objective test" that must be applied means that the alleged inconvenience was "objectively reasonable." *Id.* at 95–96. For example, a hypersensitive plaintiff who complained of cigarette smoke infiltrating a common wall shared by another townhome was unable to show that the inconvenience caused by the defendants' smoking was "objectively reasonable," in that an ordinary person would be offended or harmed by the smoke. *Id.* at 96 (citing *Schuman v. Greenbelt Homes, Inc.*, 212 Md. App. 456–73 (2013)). The theater owner admitted that the drive-in business was unique in its need for darkness to operate. *Id.* at 99–100. Thus, we held that the drive-in's harm was not "objectively reasonable" because, as a business that "thrives on darkness," it was especially sensitive. *Id.* at 100–01.

In this case, the court did not base its decision on the special sensitivities or preferences of the Pensells regarding specific events. Instead, the ruling focused on

evidence demonstrating that the disputed events caused unreasonable and substantial interference for the Pensells. Although key evidence was primarily drawn from Mrs. Pensell's testimony and her personal knowledge, this does not mean the court decided the case because of her special sensitivities or preferences. Mrs. Pensell indeed supported the use of the Park for a youth sailing school, but she testified that the sailing program did not cause excessive noise or disrupt the use of the Pensells' property.

We also disagree with the City's assertion that the Pensells were not objectively prevented from accessing their property. The City raises three points that focus on the weight of the evidence rather than whether the court applied the correct standard in assessing it. First, the City claims that the Pensells always had vehicular access to Bourbon Street through the marina property. However, Mrs. Pensell testified that there was no vehicular access to Bourbon Street from the Pensells' front driveway and garage except through the emergency gate of the marina, which was generally locked. The court addressed this point in its oral ruling, stating that the alternative route through Bourbon Street was impractical: "[The Pensells are] entitled to go in their front door. Moreover, expecting guests or family members to use an alternative access as proposed by the City is not reasonable."

Second, the City argues that during farmers' markets, a designated access lane was left open for the Pensells to reach their driveway. However, Mrs. Pensell testified that the Pensells' driveway was blocked by vendors who spread out along Congress Avenue in 2020

and 2021. Additionally, the City issued notices at the time informing the Pensells that it would be closing Congress Avenue to vehicular traffic during farmers' markets.

Finally, the City argues that the Pensells were not objectively prevented from accessing their property because they "could always call for police assistance if they were having trouble accessing their property." For support, it cites *Green v. Garrett*, 192 Md. 52, 66 (1949), for the purported proposition that for nuisances involving access, an injunction is not granted as a matter of right if police can "correct the situation."

The City misconstrues *Green*. There, citizens of Baltimore City who lived near the Baltimore Stadium sought to enjoin the Baltimore City Department of Recreation and Parks and the Baltimore Baseball and Exhibition Company from allowing professional baseball to be played at Baltimore Stadium. *Id.* at 56. They also sought to enjoin the use of the loudspeaker system, floodlights, and the nearby parking facilities. *Id.* The citizens expressed concern over the unseemly behavior and disorderly conduct of individuals in crowds attending and leaving the games. *Id.* at 66.

The Supreme Court of Maryland reviewed English case law that addressed "the problems of the obstruction of a highway and the denial of the access to adjacent premises by crowds assembled because of lawful entertainments or business on adjacent property." *Id.* It summarized:

> [W]here, by virtue of an entertainment or business advertisement, large crowds of people gather in front of a plaintiff's premises preventing proper access to it, a nuisance is created against which an injunction will be granted in a proper case. Such an injunction, however, is not granted as a matter of right or upon the immediate presentation of the case because it is generally found that measures can be taken by the parties themselves to get the services

> of an adequate police force which will correct the situation. The fact that it is a police matter is not regarded as a complete and absolute defense because the defendants in such cases have produced a nuisance, and if it cannot be abated by the police, the English judges do not hesitate to state that they would enjoin an entire entertainment or advertisement.

Id. at 66–67.

We do not read *Green* for the blanket proposition that a plaintiff is not entitled to injunctive relief if police can address the obstruction problem. Instead, the excerpt in *Green* relates to the permissible scope of an injunction to remedy the nuisance. The Court later articulated this in *Fox v. Ewers*, 195 Md. 650, 662 (1950). It explained that what was "illustrated in a number of English cases cited in *Green v. Garrett*" is that "[c]ourts do not needlessly prohibit an otherwise lawful business, but they do not hesitate to prohibit a business if it cannot be conducted without impairing the legal rights of neighbors." *Id.*

The City's claim that "the Pensells could always call for police assistance if they were having trouble accessing their property" does not mean that the court erred in its finding of nuisance.[6] Although there were occasions when the Pensells arranged with police to gain vehicular access to the front of their home, the court apparently concluded that the blockages caused by these events were prevalent enough that they presented unreasonable interferences on the Pensells' enjoyment of their property.

[6] The City insinuates that the Pensells' ability to call for police assistance to gain vehicular access to the front of their home would have always resulted in unfettered access to it. However, the City's police chief testified that if a request was made for police assistance, the police would "try to accommodate as best [they] possibly can," but "a lot would be dependent on what the request is."

For the reasons stated, the court did not err in concluding that the Pensells were entitled to injunctive relief based on its finding that the City's interference with the Pensells' use and enjoyment of their property was unreasonable and substantial and that the inconvenience or harm caused by the interference was objectively reasonable.

b. Certain Provisions of the Injunction Were Overly Broad.

Although the circuit court did not err in finding that a private nuisance existed, it did err in fashioning a remedy for that nuisance in overly broad ways. "As a general rule, the decision to grant or deny an injunction in an appropriate case is a discretionary one." *Fantasy Valley Resort, Inc.*, 92 Md. App. at 272. "The exercise of discretion by the trial court will not be disturbed on appeal absent a showing that discretion has been abused." *Id.*

In exercising equitable powers to abate nuisances, "considerable latitude is permitted to the Courts in dealing with their decrees relative to injunctions." *Bishop Processing Co.*, 213 Md. at 474. That said, "[w]hile courts may have considerable latitude in fashioning injunctive orders to abate nuisances, there are well-established limitations upon this latitude." *Becker v. State*, 363 Md. 77, 88 (2001). "One general limiting principle is that an injunction abating a nuisance 'should go no further than is absolutely necessary to protect the rights of the parties seeking such injunction.'" *Id.* (quoting *Singer v. James*, 130 Md. 382, 387 (1917)). In other words, "[t]he remedy prescribed should be no greater than is necessary to achieve the desired result." *Id.* (quoting *Comm'r v. Anderson*, 73 N.W.2d 280, 282 (Mich. 1955)).

In *Five Oaks Corp. v. Gathmann*, 190 Md. 348 (1948), the Supreme Court of Maryland struck down those provisions of an order that enjoined the operators of an all-night restaurant from playing music after midnight and implemented opening and closing hours, reasoning that the order went "further than [was] justified." *Id.* at 358–59. The Court noted that it may be possible for the restaurant operators to play music after midnight and otherwise conduct their all-night business in a manner that would not disturb the plaintiffs. *Id.* at 359.

The Court explained that the scope of an injunction to remedy the nuisance must be determined based on the facts of each case. It explained:

> [W]e think that in a nuisance case such as the one before us general decrees should be passed with only such specific prohibitions as appear to provide the only remedies. In other respects, the offending party should be allowed to take such measures as in its opinion will reach the desired result. If these measures are not adequate or sufficient, further application can be made to the court, . . . appropriate action can be taken, and the decree made more specific where it appears to be necessary.

Id. at 360; *see also Carr's Beach Amusement Co. v. Annapolis Rds. Prop. Owners Ass'n, Inc.*, 222 Md. 392, 394–95, 397 (1960) (affirming decree enjoining defendant amusement park from "operating and maintaining their loud-speakers or public address systems at *such excessive levels of sound volume as to penetrate the private homes of the individual plaintiffs herein* so as to d[i]sturb the comfortable enjoyment of their said homes by the said plaintiffs" (emphasis added)); *Washington Cleaners & Dyers, Inc. v. Albrecht*, 157 Md. 389, 394, 400–01 (1929) (affirming the entry of an order enjoining defendant cleaner from using varnalene or gasoline "in such quantity and manner as to be deleterious to the

health of the neighborhood" as not too vague or indefinite); *Singer*, 130 Md. at 384–87 (explaining that part of an injunction that restrained the defendant from operating a machine shop causing noises, smoke, or other effluvium injurious to health was too general because it was not confined to such noises, smoke, and effluvium as shall be injurious to the health or offensive to the senses of the plaintiff or to the occupants of his property).

Applying the above principles, we review each provision of the order for permanent injunction. Except for the annual Independence Day Celebration, provision 3(a) enjoins any use or approval of any special events by the City that eliminates or materially restricts vehicular ingress and egress to and from the Pensells' property through their front driveway, providing access to Congress Avenue through the Hutchins Park parking area. This provision is not overly broad; it specifically addressed the access issues that the court found constituted a nuisance.

Except for the annual Independence Day Celebration, provision 3(b) enjoins the City from conducting or approving any special events at the Park that use amplified sound. This prohibition against using amplified sound—other than during the annual Independence Day Celebration—went further than necessary to achieve the desired result. This is because the evidence did not demonstrate that all forms of amplified sound were substantial or unreasonable.

There was no evidence to suggest that *any* "amplified sound" would have been substantial or unreasonable. In its oral ruling, the court recognized that the problem was not amplified sound *per se*, but rather the level of noise produced by the musical events

complained of. It may be possible to play music using amplified sound in a manner that would not be a substantial or unreasonable interference with the Pensells' enjoyment of their property. Indeed, the Pensells' expert provided examples of acceptable sound levels. To enjoin all special events at the Park using amplified sound is too general, and the injunction should be modified in a way that goes no further than is absolutely necessary to protect the rights of the parties seeking it.

Provision 3(c) enjoins the use or approval of the following special events at the Park and Congress Avenue: the Farmers' Market, Oktoberfest, Thursday "Nite" Live concerts, and carnivals. A blanket prohibition of these events goes beyond what is necessary to protect the Pensells' rights to be free from substantial, unreasonable noise or to access their property via Congress Avenue. Based on the rationale articulated in its oral ruling, the court apparently enjoined these events to ensure that the sorts of noise and access issues that had given rise to the Pensells' nuisance claim would not recur. Provision 3(c) appears to have been intended by the court to serve as a backstop to both provision 3(a) (which addresses access issues) and provision 3(b) (which dealt with excessive noise issues). Insofar as provision 3(c) was conceived to provide additional assurances that the Pensells' enjoyment of their property would not be violated, it is redundant and therefore unnecessary.

Neither side took issue with provision 3(d) or its subsections. Specifically, subsection (d)(1) allowed the tent to remain in place. Subsections (d)(2) and (3) permitted the City to issue alcohol permits and approve other events provided that the City adhered to the injunctive relief regarding noise and access in provisions 3(a) and 3(b).

For the reasons stated, we affirm the court's Order for Permanent Injunction in part and reverse in part. We shall remand the case for the court to strike provision 3(c) and modify provision 3(b) in accordance with the above. We leave it to the court's discretion whether and how to adjust provision 3(d) to ensure it remains consistent with other modifications to the order.

B.

Pensells' and 211 Congress's Public Nuisance Claim

The Pensells and 211 Congress contend that the court erred in holding that the complained-of events did not create a public nuisance. They assert that the events held at Hutchins Park are often unsafe because the events host more attendees than can safely be accommodated in that area and often involve road closures. Moreover, the City did not assess the impact of the Tent before installing it. Finally, the regular closure of Congress Avenue blocks access to the Pensells' and 211 Congress's properties in a way that constitutes a "different kind" of harm than that suffered by the public generally.

In its oral ruling, the circuit court summarized the evidence adduced and concluded that neither the Pensells nor 211 Congress had shown that the events interfered with a right held by the public:

> I find there's just not sufficient evidence that any public nuisance has occurred. During the larger events, [the City's police chief] testified she was present and other City officials were there. The Chief testified that there was also an Independence Day festival at different locations to ensure the safety of the public. I don't think the plaintiffs have offered any evidence that ha[s] arisen concerning these events as a public nuisance. [The] Chief . . . testified she had not received any calls regarding unsafe conduct during these events.

> There's not also been any other testimony from other citizens of Havre de Grace regarding the noise from these events being bothersome or disturbing.

The court reviewed concerns about the large crowds at Oktoberfest and determined that these did not constitute a public nuisance. Regarding Fourth of July celebrations, the court noted that this event is a marquee occasion for the City and is held in various locations, not just at the park. As a result, the court did not view the celebration as a public nuisance. The court concluded:

> [R]ather than interfering with the community at large, again, the community at large seems to be enjoying the events. Therefore, the [Pensells and 211 Congress] have failed to prove by a preponderance of the evidence that any conduct by the [City] constituted an unreasonable interference with the right of the community at large.

In reviewing the evidence in the light most favorable to the City, the prevailing party for this issue, we conclude that the circuit did not err in concluding there was no evidence that the challenged events amounted to an unreasonable interference with a right common to the general public. The evidence did not demonstrate conduct that was a significant interference with "the public health, the public safety, the public peace, the public comfort or the public convenience." Restatement (Second) of Torts § 821B (1979). Because we affirm the court's conclusion that there was no interference with a right common to the general public, we need not address whether the interferences complained of satisfy the special-injury requirement.

II.

AGREEMENTS

Issues (b), (c), (d), and (g) center on three agreements that resolved litigation between the City and 211 Congress's predecessors in interest concerning the property at 211 Congress Avenue (the "Property"). To understand how these agreements were consummated and their relevant provisions, we must go back to when the story began, over sixty years ago.

A.

Relevant Background

In 1962, A. Donald Asher and his wife, Betty Asher, bought the Property. In 1970, Mr. Asher built an eighty-foot pier on the Property in the Susquehanna River. In 1973, the City constructed the Park at the foot of Congress Avenue and a seventy-five-foot fishing pier in the river.

In 1995, Mr. Asher sought to extend his pier by an additional 100 feet. He believed that the sediment build-up from the Park's construction had lowered the water depth around his existing pier, causing his sailboat to be aground. He aimed to extend the pier further out so he could access deep water. However, he was prohibited from any construction beyond his existing pier because it would interfere with the City's plan to build new boat slips at the Park. As a result, Mr. Asher filed a lawsuit against the City for inverse condemnation, alleging that the City's use of the river had prevented him from exercising his riparian right to wharf out from the Property into the river (the "Asher Lawsuit").

To resolve the lawsuit, the City and Mr. Asher agreed to rotate the riparian line between the Property and the Park at a northerly sixty-eight-degree angle. This change would increase the City's area south of the line and decrease Mr. Asher's area north of the line. As a result of this adjustment, Mr. Asher would need to remove his pier, which extended over the new riparian line, and build a new one on his side of the line.

Then-City Attorney Paul Ishak prepared a settlement agreement dated June 1, 1998. The terms included that the parties would recognize the new riparian line and that the City would approve the new location of Mr. Asher's pier. Around the same time, the City was planning to expand the Park and reconstruct the foot of Congress Avenue to accommodate festivals and events in the parking area. In conjunction with that plan, the parties also sought to determine the boundary line between Mr. Asher's and the City's properties where a fence existed along Congress Avenue.

The settlement agreement provided that Mr. Asher would pay for a survey of his property's southern boundary with Congress Avenue. Once the survey was completed, the parties would enter into a boundary line agreement concerning the boundary line along Congress Avenue and the new riparian line. Mr. Asher's attorney proposed some changes to the agreement, one of which included allowing Mr. Asher to continue occupying a portion of the City's property along Congress Avenue, if the survey showed that he was doing so, for a nominal amount, "such as $1 per year."

Mr. Asher died in May 2000 before the parties could finalize and execute the settlement agreement. Thereafter, Mr. Asher's estate was substituted as the plaintiff in the

Asher Lawsuit. After further negotiations, Mr. Asher's estate and the City placed their settlement agreement on the record before the circuit court on September 21, 2001. Harold Norton, who by that time had replaced Mr. Ishak as City Attorney, announced that the parties had reached a settlement agreement and proceeded to place the terms on the record, which tracked the terms in the settlement agreement dated June 1, 1998.

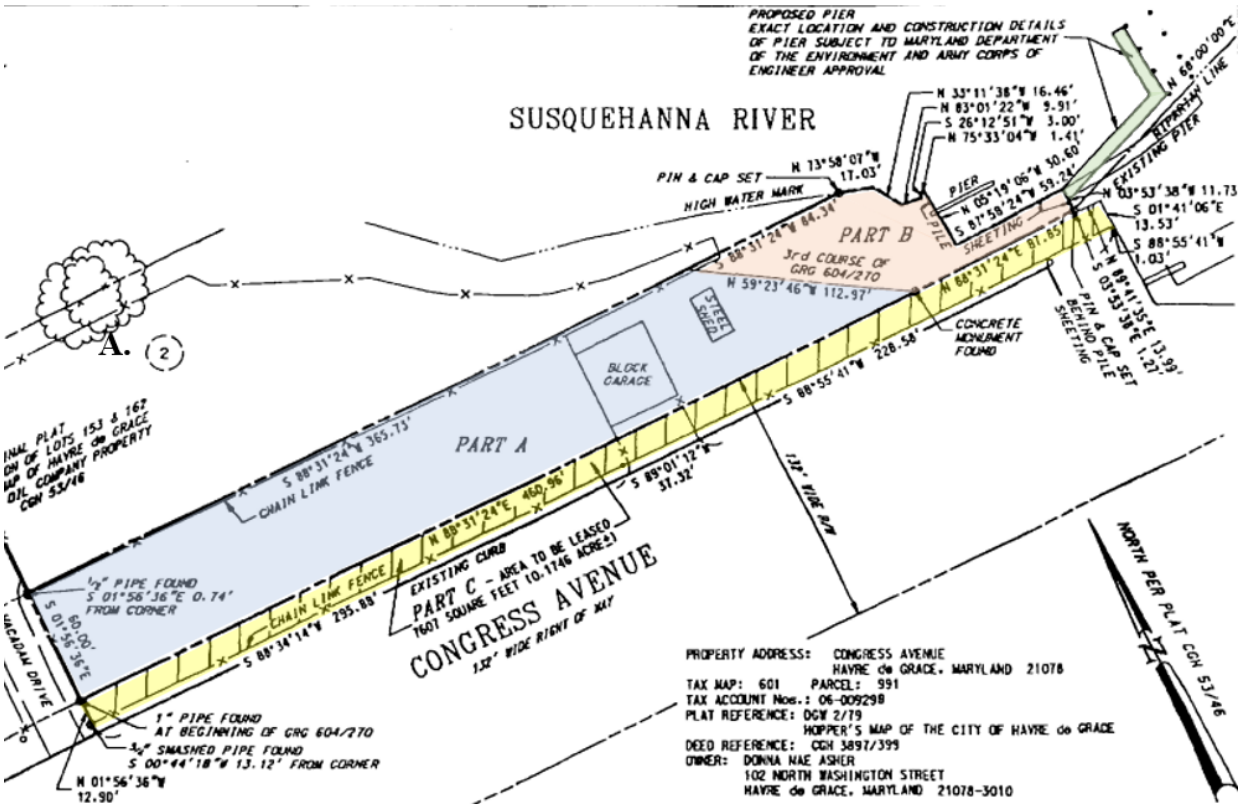
Counsel for Mr. Asher's estate highlighted an adjustment to these terms concerning the boundary line: if a survey found that the fence line area between the Ashers' and City's properties did belong to the City, "the City agrees to lease that in perpetuity for a dollar a year to the Ashers." Mr. Norton, on behalf of the City, acknowledged that "very important point. If there is any existing encroachment on City property, we would take whatever steps necessary to allow the Ashers to continue to use that property at no expense."

A few months after the hearing, Mr. Asher's estate conveyed the Property to Mr. Asher's daughter, Donna Mae Asher.

In the meantime, the City decided to undertake a substantial renovation project for the Park, which raised additional concerns regarding the project's proposed closing of part of Congress Avenue, the elimination of a portion of the Property's access to Congress Avenue, and the project's possible interference with Ms. Asher's access to the Property. The City and Ms. Asher engaged in extensive discussions and negotiations to develop a reasonable accommodation on the part of the City concerning the project and its impact on the Property. These negotiations resulted in a separate agreement, which we refer to as the

"Access Agreement," to address the relationship between the Property and the renovation project at the Park.

In accordance with the terms of the settlement agreement, Ms. Asher had the Property surveyed (the "Asher Survey") in December 2002, the results of which are reproduced below. For clarity, we have color-coded pertinent areas:



The Property consists of two parts: "PART A," which measures 24,801 square feet (highlighted in blue) and contains the storage garage (labeled "Block Garage"); and "PART B," which measures 4,778 square feet and borders the Susquehanna River (highlighted in pink).

The survey delineated the new riparian line at a northerly angle of sixty-eight degrees. It shows the Asher pier extended beyond the new riparian line and marks the

location of the proposed new pier, which would be constructed on the Asher side of the riparian line (highlighted in green).

The survey also established that the fence along Congress Avenue, labeled "Chain Link Fence," extended twelve feet past the Property's southern boundary line and into the City's property. The portion of City-owned land between the Property's southern boundary line and the fence is labeled "Part C - area to be leased" (highlighted in yellow). Part C measures about 7,600 square feet.

As mentioned, the parties had initially contemplated a perpetual lease of Part C for $1.00 per year to Ms. Asher. Later in December 2002, while the parties were negotiating specific terms of the lease agreement, Ms. Asher, through counsel, requested that the lease agreement reflect that the lease "run with the land." As a result, "the owner(s) of the [P]roperty from time to time will also be the Tenant under this Lease." The addition was accepted and incorporated into the draft lease agreement.

In a memorandum to the Mayor and City Council dated January 17, 2003, Mr. Norton presented drafts of the following for the City Council's review:

1. The Amended Settlement & Boundary Line Agreement;
2. The Access Agreement; and
3. The lease agreement for the area designated Part C in the Asher Survey, as well as a resolution to approve the lease agreement.

He explained the genesis of these agreements to the City Council, as summarized above. He advised that the lease agreement needed to be approved by the City Council under § 76

of the Havre de Grace Charter ("Charter"), while the Mayor could execute the other agreements without City Council vote.

On January 28, 2003, Ms. Asher and the Mayor executed the Amended Settlement & Boundary Line Agreement and the Access Agreement, which were held in escrow pending approval of the lease agreement by the City Council.

At a council meeting on February 3, 2003, one council member raised concerns that the perpetual lease was not permitted under § 76 of the Charter, which authorizes only non-renewable lease terms of fifty years or less. Another concern was the proposed yearly rent amount of $1.00, which was less than the yearly rate under the City's fee schedule established by Resolution 98-7. Resolution 98-7, which was in effect as of September 30, 1998, provided that the lease of undeveloped City-owned property or rights-of-way was $0.25 per square foot per year. Applying the rate under the fee schedule to the 7,600 square feet of area in Part C of the Asher Survey would have been approximately $1,900 per year (7,600 square feet × $0.25 per square foot).

As a result of these concerns, the Mayor postponed a vote on the resolution until March 3, 2003, and established an ad hoc committee to evaluate and address these concerns.

In the meantime, the parties agreed that § 76 of the Charter limited leases of City-owned real estate to fifty years, and thus, concern over the perpetuity of the lease became moot. The parties agreed to a single term of fifty years. As for the rent of $1.00 per year, Mr. Norton understood that the reason the rent was to be limited to $1.00 was due to the

City's receipt of other valuable consideration, i.e., Ms. Asher's dismissal of the Asher Lawsuit against the City, her obligations under the Amended Settlement & Boundary Line Agreement and the Access Agreement, and the release and waiver of all claims in the litigation as well as claims related to the closing of the easternmost portion of Congress Avenue.

On February 19, 2003, the ad hoc committee met. As a result of the meeting, reference to the lease term in all three agreements was amended to reflect that the lease shall be for a term of fifty years. No change was made to the rental amount. The Amended Settlement & Boundary Line Agreement and the Access Agreement continued to be held in escrow pending approval of the lease agreement by the City Council.

At a meeting on March 3, 2003, the City Council unanimously approved the lease agreement under Resolution 2003-1. During the meeting, one councilmember addressed the earlier concern about the yearly rent of $1.00. He explained that the agreement regarding the rent amount was "actually reached in June of 1998" before the fee schedule for leases took effect in September of 1998, "[s]o it kind of left that issue where it was."

With the approval of the City Council, the parties thereafter executed the lease agreement on March 5, 2003 ("Lease Agreement," *infra*). Ms. Asher paid $50 in rent and recorded the executed Amended Settlement & Boundary Agreement, the Access Agreement, and the Lease Agreement in the land records for Harford County. A copy of the Asher Survey was recorded along with each of the agreements.

When 211 Congress purchased the Property from Ms. Asher in 2014, Mr. Brandon initially requested the City's consent to assign the Lease Agreement to 211 Congress. Ultimately, however, Ms. Asher assigned the Lease Agreement to 211 Congress without the City's consent. The assignment was recorded in the land records.

With this background, we turn to the relevant provisions of each executed agreement.

B.

Amended Settlement & Boundary Line Agreement

In the Amended Settlement & Boundary Line Agreement, the parties recite that on or about June 1, 1998, they "reached an agreement" to resolve the Asher Lawsuit but that Mr. Asher passed away before executing the written settlement agreement. They acknowledged that the parties placed the settlement agreement on the record on September 21, 2001, and that the Amended Settlement & Boundary Line Agreement was intended to modify and clarify specific terms of the settlement agreement placed on the record on that date.

In relevant part, the parties agreed that the Asher Survey demarcated the boundary line between the Property and the City's property. The parties agreed that the area south of the boundary line belonged to the City while the area north of the boundary line belonged to Ms. Asher. Paragraphs 3 and 4 provide:

> 3. Property Boundary Line. The parties agree that the property boundary line between the property of the City and the Asher Property along Congress Avenue is and shall be shown on [the Asher Survey, attached as an exhibit] (the "Property Boundary Line"). As pertaining to the real property which is

> the subject of this Agreement, Ms. Asher, on behalf of herself, her personal representatives, and assigns, does hereby grant, convey, release, assign, and quitclaim to the Mayor and City Council of Havre de Grace, its successors and assigns, any and all of Ms. Asher's right, title, interest, and estate in and to all that area on the southerly side of the Property Boundary Line as shown on [the Asher Survey], saving and excepting Ms. Asher's rights and obligations under the Lease described in Section 4 below, and *the Mayor and City Council of Havre de Grace,* on behalf of itself, its successors, and assigns, *does hereby grant, convey, release, assign, and quitclaim to Ms. Asher,* her personal representatives and assigns, *any and all of the City's right, title, interest, and estate in and to all that area on the northerly side of the Property Boundary Line* as shown on [the Asher Survey], saving and excepting the City's rights and obligations under the Lease described in Section 4 below.
>
> 4. Lease. The parties shall prepare, execute, and record among the Land Records a lease from the City of that portion of the City's property shown on [the Asher Survey], south of the southern boundary line of the Asher property and the line on City property marked "Chain Link Fence" [Part C of the Asher Survey]. The Lease shall in [sic] the City's standard form, with such modifications as may be necessary and appropriate under the circumstances, and approved by the City Council as provided under Section 76 of the City charter. The Lease shall be for a term of fifty (50) years, at a rental of one dollar per year.

(emphasis added).

The Amended Settlement & Boundary Agreement further specifies that it "shall run with the land and shall bind and inure to the benefit of the City and Ms. Asher and subsequent owner or tenant of their respective properties."

C.

Access Agreement

The Access Agreement outlines the specific rights and duties of the parties concerning Congress Avenue. In relevant part, Paragraphs 1 and 2 of the agreement provide that Ms. Asher "will have the right" to access the water and sewer lines, located in the

City's right of way, to service her property, at her expense, subject to the execution of an agreement like a public works agreement.

The City planned to plant trees and install "ballards"[7] and streetlights along the northerly side of Congress Avenue. Under Paragraph 3.c., the City agreed that "[n]one of the trees or b[o]llards are to be placed in front of any existing gate" on the Property. It further provides that if the Property is developed to require removal of any trees or bollards, "the City agrees that [Ms.] Asher may, at her expense, move or remove (and replace) any such tree or b[o]llard, provided that may be required to approve the moving or removal of any public trees located in the City's Congress Avenue right of way."

Under Paragraph 4, the City agreed that "any owner, resident, or occupant" of the Property "will have pedestrian and vehicular access to his or her unit or property during any special events which may be held on Congress Avenue, subject to such reasonable traffic controls and channelization as the City may prescribe."

Paragraph 5 references the fence on the City's property in Part C of the Asher Survey. The City agreed to "license" the fence to Ms. Asher during the term of the lease. Under Paragraph 5.a., the City agreed to "allow the existing chain link fence to remain in its present location on City property . . . provided the fence is maintained in its present or better condition, until the [] Property is comprehensively developed." Paragraph 5.c. provides that when the Property is comprehensively developed, Ms. Asher shall remove

[7] These are more commonly known as "bollards."

the fence and may replace it with a fence or other structure consistent with the architecture of such unit or other improvements.

Paragraph 5.d. required Ms. Asher to remove certain items from the Property (two cranes, boat lift, and torn-up boat), among other obligations.

Paragraphs 6 and 7 identify the benefited parties and provide that the agreement will run with the land:

> 6. *Benefitted Parties*. This Agreement shall bind and inure to the benefit of the City and its successor(s), and [Ms.] Asher, her heirs, personal representatives, and assigns including without limitation any person or entity who hereafter owns or leases all or any portion of the [] Property. As used in this Agreement, "Asher" shall mean and include any such person or entity.
>
> 7. *Agreement to Run with the Land*. This Agreement shall run with the land and shall bind and inure to the benefit of the City and Asher and any subsequent owner or tenant of all or any portion of the [] Property.

D.

Resolution 2003-1 and Lease Agreement

Resolution 2003-1 recited the history of agreements made to resolve the Asher Lawsuit. It indicated that on or about June 1, 1998, Mr. Asher and the City "reached an agreement" to resolve the Asher Lawsuit; that on September 21, 2001, the City and Mr. Asher's estate placed the settlement agreement on the record before the Circuit Court for Harford County; and that on January 28, 2003, the City and Ms. Asher executed the Amended Settlement & Boundary Line Agreement clarifying the terms of the settlement agreement placed on the record in court.

The Lease Agreement provides that the City would rent the area described in PART C of the Asher Survey to Ms. Asher for fifty years at a rate of $1.00 per year. The agreement

prohibits assigning or subletting the lease without the City's consent, but provides that, notwithstanding the limitation, the lease runs with the land and would inure to the benefit of any subsequent owner of the Property:

> **19. <u>ASSIGNMENT AND SUBLETTING</u>**
>
> (a) Tenant shall not make or permit an assignment or sublease of this Lease or any interest of Tenant herein, in whole or in part, by operation of law or otherwise, without first obtaining in each and every instance the prior written consent of Landlord. Landlord has the absolute right to deny Tenant permission to assign or sublet this Lease for any reason or for no reason, which consent shall be in the Landlord's sole discretion.
>
> (b) Notwithstanding the foregoing subsection 19(a), it is understood and agreed that this Lease shall run with the land and shall bind and inure to the benefit of Landlord and Tenant and any subsequent owner of all or any portion of the Property adjacent to the Premises, including any owner of a lot created by subdivision of the Property and/or the owner of any lot or unit in a condominium regime or townhouse association which may be formed in connection with all or any portion of the Property adjacent to the Premises.

The agreement further warranted that the tenant shall have peaceable and quiet enjoyment of the area:

> **9. <u>QUIET ENJOYMENT</u>.** Landlord warrants that Tenant shall be granted peaceable and quite enjoyment of the Premises, provided that the Tenant fully performs the terms, covenants, and conditions imposed herein.

In a separate paragraph, the agreement reiterates that the lease would run with the land:

> **31. <u>LEASE TO RUN WITH THE LAND</u>.** This Lease shall run with the land and shall bind and inure to the benefit of the Tenant and any subsequent owner of the [] [P]roperty.

E.

Circuit Court's Rulings

1.

Amended Settlement & Boundary Line Agreement and Access Agreement

At trial, the City argued that the Amended Settlement & Boundary Line Agreement and the Access Agreement were *ultra vires* acts and thus void *ab initio* (Count V of the Counterclaim). The City maintained that these agreements amounted to a conveyance of the City's "real estate or interest therein," which required the City Council's approval under Charter, § 75. According to the City, the agreements were invalid because no such approval was obtained.

Section 75 in effect during the relevant time provides in pertinent part:

> A. Whenever the Mayor and City Council of Havre de Grace determines that *any City-owned real estate or interest therein*, other than utilities, is no longer needed for any public use, and authorizes the sale, transfer or conveyance of the same, it shall be offered for sale to the general public by sealed bid. The City Council shall, in the approving resolution, set all bid specifications, including any minimum bid amount.

(2002) (emphasis added).

If the City Council determines that the City-owned real estate or interest therein is no longer needed for any public use and offers it for sale to the general public, the City must provide notice of the offering and undergo a bid process. Subsections B and C provide the following:

> B. A notice offering the general public the opportunity to place a bid on said real estate or interest shall be (1) published in a newspaper . . . for at least three (3) consecutive weeks prior to the deadline for the acceptance of

> bids, and (ii) posted at City Hall . . . . The notice shall contain information concerning the bid process and bid specifications, including . . . (iv) the location of the real estate or interest, and (v) the legal description of the real estate or interest as recorded in the land records of Harford County . . . .
>
> C. All bids shall be opened and read aloud at City Hall on the date and time specified in the bid requests. The highest bid that meets all specifications shall constitute an acceptance of the City's offer to sell the subject real estate or interest, subject to all bid specifications and the conditions contained in this Section.

The City Council, however, can waive the bid requirements and authorize the sale by negotiated contract if it authorizes so by resolution upon determining that the approach is in the best interests of the City. Subsection D provides:

> D. Anything contained in this Section to the contrary notwithstanding, if it is determined by not less than five of the members of the City Council in the authorizing resolution to be in the best interest of the City, the City Council may . . . (ii) waive the provisions of this Section pertaining to bid requirements and may authorize a sale by negotiated contract or a shortened notice schedule.

Regardless of whether the City-owned real estate or interest therein is sold by the bid process under subsections B and C, or by negotiated contract under subsection D, the Charter provides that it will be sold, transferred, or conveyed "as is" as to its title and physical condition, unless otherwise approved by resolution. Subsection F provides:

> F. Unless the approving resolution expressly provides otherwise, all City-owned real estate and interests therein shall be sold, transferred, and conveyed "as is" as to its title and physical condition.

The Charter further provides that the sale, transfer, or conveyance of City-owned real estate or interest is subject to a referendum. Subsection G provides:

> G. The sale, transfer or conveyance of said real estate or interest therein shall occur only after approval of a majority of legal voters casting ballots at a

> general or special election held for that purpose. Public notice of proposed sale, transfer or conveyance and the election concerning same shall be made in a newspaper . . . The notice shall include the following information: (i) the location of the real estate or interest, (ii) the legal description of the real estate or interest as recorded in the land records of Harford County, (iii) the current appraised value of the real estate or interest for tax purposes as determined by the Maryland State Department of Assessments and Taxation, (iv) the proposed purchase price, and (v) the proposed use of the real estate or interest.

However, a referendum is not required under certain circumstances. Subsection I provides:

> I. A referendum shall not be required under the following circumstances:
>
> (1) The sale, transfer or conveyance of any drainage or utility easement.
>
> (2) *The sale, transfer or conveyance of real estate by virtue of deeds and boundary line agreements which establish property lines and right-of-way lines*.
>
> (3) The sale, transfer or conveyance of real estate acquired in connection with the tax sales or the foreclosure of tax liens.

(emphasis added).

The City argued that an "interest" in the City's real estate was conveyed under both agreements. Accordingly, under Charter, § 75, the City Council had to first determine that the City's interest in its real estate was no longer needed for public use. Because that did not occur, both agreements were invalid.

211 Congress responded that the Amended Settlement & Boundary Line Agreement and the Access Agreement did not convey City-owned real estate. The Amended Settlement & Boundary Line Agreement established the new riparian line, which expanded the City's rights, rather than reduced them. And the boundary line along Congress Avenue merely established the property each party owned, as confirmed in the Asher Survey. In addition,

the Access Agreement simply specified access between the Property and the Park. Thus, according to 211 Congress, neither agreement conveyed any of the City's real estate.

The court concluded that the Amended Settlement & Boundary Line Agreement, as well as the Access Agreement, were not *ultra vires* acts. This was because these agreements did not involve the sale or transfer of City-owned real estate and, therefore, did not require approval from the City Council under the Charter. The court explained:

> I deny the City's request for declaratory judgment and I find that both the Maryland Code and Section [7]5 of the City Charter do not apply to the boundary line and the access agreement because these agreements, in my mind, do not involve the sale or transfer of City-owned real estate.

2.

Lease Agreement

At trial, the City argued that the Lease Agreement was invalid (Count VI of the Counterclaim). It contended that the City Council's approval of Resolution 2003-1 and the yearly rent amount of $1.00 was based on the erroneous belief that the parties entered into a settlement agreement in June 1998 before the City's fee schedule was established. This mistaken belief was significant, according to the City, because the City Council apparently believed that it need not comply with the rental rate fee schedule established in September 1998.

The City also argued that the Lease Agreement was invalid because Resolution 2003-1, though approved by the City Council, was attested to by Mr. Norton and not by the Director of Administration as required by Charter, § 19B ("All resolutions and ordinances shall be attested by the Director of Administration[.]"). In addition, Resolution

2003-1 was not kept in the records of City Hall. It had been in Mr. Norton's files. What was kept in the records of City Hall was an earlier version of the resolution signed by then-Director of Administration James Newby that contained the unapproved forty-nine-year renewable lease term. The unapproved version of the resolution had apparently been delivered to City Hall and, according to Mr. Norton's handwritten note, was superseded by the resolution approved by City Council on March 3, 2003.

Even if the Lease Agreement were valid, the City argued that the assignment of the Lease Agreement to 211 Congress was invalid because Ms. Asher assigned it without the City's consent, in violation of Paragraph 19A of the Lease Agreement (Count I of the Counterclaim). According to the City's interpretation of this provision, a tenant is obligated in each instance to obtain the City's consent when the lease is assigned.

The court concluded that the Lease Agreement was not *ultra vires*. It explained that the failure of the Director of Administration to attest to the executed Resolution 2003-1 approved by the City Council was "a mere ministerial act." In addition, the fact that this resolution was not kept in the repository of City records was "moot" because it was found in Mr. Norton's files. Regarding the "City's misinformation" regarding the rental rate,

> [I]t appears from the negotiations between the parties that the City was taking this into account in getting other valuable consideration in having the junk removed from the Asher property. And even if the City was mistaken as to the rental rate that could ordinarily be charged, this was not a mistake adduced [sic] as a result of any deception or fraud by Mr. Asher, and I don't think a mistake, an error is an appropriate reason. So I deny declaratory judgment for Count 6 [of the Counterclaim].

Having concluded that the Lease Agreement was valid, the court turned to whether Ms. Asher's assignment of the Lease Agreement to 211 Congress was invalid. The court was satisfied that Paragraph 19(b) of the Lease Agreement provides that the lease runs with the land:

> [T]he lease agreement, Section 19-B clearly states it runs with the land. This seems, to me, important that that's the only lease that runs with the land. That's there in that document for a reason. The lease automatically is transferred to 211 Congress, LLC when it purchased the property from [Ms.] Asher. The City knew what was happening with regard to what was being intended by Mr. Brandon and took no legal action. I don't think I needed all of these documents and communications between Attorneys [for the Ashers] and Norton to determine what the intention of the parties are.[8] I'm satisfied from reading the clear language of the lease agreement that the lease runs with the land, but to me, those communications . . . just reiterate[] what I already found to be true.

3.

211 Congress's Claims for Breach of the Lease Agreement and Access Agreement

Upon concluding that the three agreements were valid, the court turned to 211 Congress's claims for breaches of the Lease Agreement and Access Agreement under Counts I and II of the Complaint. The court denied both claims, explaining that no evidence suggested that 211 Congress had attempted to carry on any business activity on the unoccupied Property:

> I don't find that 211 Congress, LLC as an entity has established any breach of contract or quiet enjoyment or access. There has been no evidence at trial that suggested 211 Congress has attempted to carry on any business activity on this unoccupied property. All that's there is a shed with a boat which

[8] During trial, the parties admitted into evidence a series of communications and other documents regarding the negotiations of the Lease Agreement.

> apparently belongs to Mr. Brandon as an individual. So I don't find there's been any substantial interference with the business entity of 211 Congress.

As noted earlier, the court stated in its written order that there was "no justiciable issue" regarding these claims.

F.

Analysis

"[W]hen a party is challenging the authority of a local government to take a particular action, it is important to strip away the labels and consider the particular governmental action that is sought to be undertaken." *Angel Enters. Ltd. P'ship v. Talbot Cnty.*, 474 Md. 237, 259–60 (2021). A three-step process is used to determine the correctness of the municipality's action. *See K. Hovnanian Homes of Md., LLC v. Mayor of Havre de Grace*, 472 Md. 267, 292 (2021).

First, we determine the substance of the municipal action in question. "[W]e consider the *nature or type of governmental action* that is at the heart of the dispute." *Id.* "As part of this inquiry, we . . . look at the *substance of the action* being undertaken by the municipality." *Id.* Second, we examine "the source of the municipality's authority to undertake the action." *Town of Bel Air v. Bodt*, 487 Md. 354, 367–68 (2024); *see Hovnanian*, 472 Md. at 288–91 (municipalities derive their authority from the Municipal Home Rule Amendment and possess only such powers as have been conferred upon them by the Legislature). Finally, we evaluate "whether the contemplated action was *correctly undertaken* consistent with the grant of authority." *Hovnanian*, 472 Md. at 292.

It is well settled that "a county or municipality can make a contract *only* in the manner prescribed by the legislature[.]" *Tuxedo Cheverly Volunteer Fire Co. v. Prince George's Cnty.*, 39 Md. App. 322, 330 (1978) (emphasis added). "This rule is strict; if the municipality's charter provisions are not precisely followed during the contracting process, the contract is *ultra vires*, or outside the power of the municipal corporation to make, and void *ab initio*." *State Comm'n on Hum. Rels. v. Balt. City Dep't of Recreation & Parks*, 166 Md. App. 33, 41–42 (2005).

The City argues that all three agreements at issue were *ultra vires* and void *ab initio* because the Charter's provisions applied to them and those provisions were not followed. Specifically, the City argues that the Amended Settlement & Boundary Line Agreement, the Access Agreement, and the Lease Agreement worked together to convey an interest in City-owned real estate to Ms. Asher without complying with the legislative action required under the relevant Charter provisions. We examine each agreement separately in our analysis.

1.

Amended Settlement & Boundary Line Agreement

The substance of the governmental actions sought to be achieved under the Amended Settlement & Boundary Line Agreement was to resolve the Asher Lawsuit, establish the boundary line between the Property and City's property along Congress Avenue using the legal description in the 1962 Asher deed, and establish the new riparian line.

Under Charter, § 34, the City Council has "the power to pass and create resolutions and ordinances not contrary to the laws and Constitution of the State related to . . . City property." As recited above, § 75 of the Charter applies "[w]henever the Mayor and City Council of Havre de Grace determines that *any City-owned real estate or interest therein*, other than utilities, is no longer needed for any public use, and authorizes the sale, transfer or conveyance of the same . . . ." (emphasis added).[9]

Because the City's arguments center on the phrase "City-owned real estate or interest therein," we begin with an interpretation of this Section. "We interpret the provisions of a charter using the same canons of construction that we use to interpret statutory language." *Bodt*, 487 Md. at 370. The words "real estate" and "interest therein" are not defined in the Charter. Thus, "we look to the ordinary and popular understanding of the word[s] . . . to determine [their] meaning." *Chow v. State*, 393 Md. 431, 445 (2006). In doing so, we look at the "dictionary definitions that predate the enactment of the statute in question." *Hayden v. Md. Dep't of Nat. Res.*, 242 Md. App. 505, 525 (2019).

The 1982 version of § 75 referenced the selling and transfer of any "real estate":

[9] The Legislature gives a municipality the authority to convey its real property. Under Md. Code Ann., Local Government Article ("LG") § 5-204(c)(3), "[a] municipality may. . . sell, at public or private sale after 20 days' public notice, and convey to the purchaser any real or leasehold property belonging to the municipality if the legislative body of the municipality determines that the property is no longer needed for public use." In its principal brief, the City contends that the Amended Settlement & Boundary Line Agreement and Access Agreement conveyed "City-owned real estate or interest therein" under Charter, § 75 and therefore they had to be approved by passing an ordinance rather than by resolution according to *Hovnanian*, 472 Md. at 274. Given our dispositions regarding these two agreements *infra*, we need not address the contention.

> The Mayor and City Council is hereby authorized to acquire by purchase or condemnation proceedings, or to sell and transfer any *real estate*, other than utilities . . .

Charter, § 75 (1982) (emphasis added).

In 1984, the City Council amended § 75 to include an "interest therein":

> Whenever The Mayor and City Council of Havre de Grace authorize the sale, transfer or conveyance of any City-owned *real estate or interest therein*, other than utilities . . .

Havre de Grace, Md., Charter Amendment Resolution No. 133 (July 2, 1984) (emphasis added); *see* Charter, § 75 (1985).

Black's Law Dictionary defined "real estate" as"

> Land and anything permanently affixed to the land, such as buildings, fences, and those things attached to the buildings, such as light fixtures, plumbing and heating fixtures, or other such items which would be personal property if not attached. The term is generally synonymous with real property.

Real Estate, Black's Law Dictionary (5th ed. 1979).

It defined "interest" in the context of property as:

> [L]ands or things real, it is frequently used in connection with the terms "estate," "right," and "title." More particularly it means a right to have the advantage accruing from anything; any right in the nature of property, but less than title. . . . The word "interest" is used in the Restatement of Property both generically to include varying aggregates of rights, privileges, powers and immunities and distributively to mean any one of them.

Interest, Black's Law Dictionary (5th ed. 1979).

"Therein" means "[i]n that place." *Therein*, Black's Law Dictionary (5th ed. 1979).

a. The Amended Settlement & Boundary Line Agreement Does Not Convey "City-Owned Real Estate or Interest Therein."

We conclude that the Amended Settlement & Boundary Line Agreement did not convey City-owned real estate. The City does not seriously dispute that the establishment of the new riparian line did not convey the City's real estate. Regarding the boundary line along Congress Avenue, the agreement simply determined the location of the true boundary line between the properties that the City and Ms. Asher already owned; it did not convey any land. *See Boyd's Lessee v. Graves*, 17 U.S. 513, 517–18 (1819) (agreement to settle the dividing line between properties by a surveyor mutually employed is not a conveyance of land; it is "merely a submission of a matter of fact, to ascertain where the line would run, on actual survey"); *Norberg v. Fitzgerald*, 453 A.2d 1301, 1303 (N.H. 1982) (an agreement as to the true boundary line of adjoining landowners "does not create or transfer title from one party to the other, but simply removes uncertainty as to the exact location of the boundary"); *Downing v. Boehringer*, 349 P.2d 306, 308 (Idaho 1960) ("[A]n agreement fixing the boundary line is not regarded as a conveyance of any land from one to the other, but merely the location of the respective existing estates and the common boundary of each of the parties."); *Clapp v. Churchill*, 130 P. 1061, 1063 (Cal. 1913) ("When [a boundary line] agreement has been deliberately entered into, it is not the theory of the law that there has been a conveyance of any land from the one coterminous owner to the other, but it is simply that they have agreed between themselves as to the land which they respectively own under circumstances which estop either of them thereafter from denying it."); *Farr v. Woolfolk*, 45 S.E. 230, 230–31 (Ga. 1903) (explaining that the object of a boundary line

agreement is not to make a conveyance and transfer to one person of lands which belong to another).

The City argues that boundary line agreements, such as the one in this case, are addressed under § 75.I.(2): "A referendum shall not be required under the following circumstances: . . . (2) The sale, transfer or conveyance of real estate by virtue of . . . boundary line agreements which establish property lines and right-of-way lines." According to the City, this means that the Mayor and the City Attorney did not have the authority to enter into a boundary line agreement here. However, the contention assumes a "sale, transfer or conveyance of real estate," which, as we have concluded, did not happen. Therefore, the City's reliance on other provisions of § 75 is unavailing.

The City turns to the "interest therein" prong of § 75.A. It claims that the Amended Settlement & Boundary Line Agreement constituted a conveyance of the City's "interest" in its real estate. The City cites *Mercantile-Safe Deposit & Trust Co. v. Mayor of Baltimore*, 308 Md. 627 (1987), for the general proposition that covenants that run with the land are property interests. *Id.* at 641 ("The view that covenants running with the land are indeed property interests is entirely consistent with Maryland decisions."). On that premise, the City contends that, because the agreement states it runs with the land, and because covenants that run with the land constitute property interests, the agreement therefore conveyed an interest in City-owned real estate.

Covenants in the context of real property "are characterized by the nature of the performance called for (the burden of the covenant)." Restatement (Third) of Property

(Servitudes) § 1.3 cmt. e (2000). An "affirmative covenant" requires the covenantor to do something either on or off land owned or occupied by the covenantor. *Id.* A "negative covenant" requires the covenantor to refrain from doing something. *Id.* "If the required performance limits the uses that can be made by the owner or occupier of land, the covenant is usually called a 'restrictive covenant.'" *Id.*

In *Mercantile*, leases of two improved properties included agreements requiring their lessee to restore the demised premises to certain conditions prior to the termination of the leases. 308 Md. at 629. The Supreme Court of Maryland first established that the restoration agreements were affirmative covenants because they imposed on the covenantor/lessee the future obligation to restore the altered premises. *Id.* at 636. The Court evaluated whether the restoration covenants were covenants running with the land, and concluded they were. *Id.* at 646. Therefore, it concluded that the covenants were property interests. *Id.*

The City insinuates that the Amended Settlement & Boundary Line Agreement contains covenants (i.e., agreements regarding the use of land, *supra*), but it does not identify any in its brief. *See* Md. Rule 8-504(a)(6); *Konover Prop. Tr., Inc. v. WHE Assocs., Inc.*, 142 Md. App. 476, 494 (2002) (it is not our function "to attempt to fashion coherent legal theories to support appellant's . . . claims"); *Fed. Land Bank of Balt., Inc. v. Esham*, 43 Md. App. 446, 458 (1979) ("It is the appellant['s] primary obligation . . . to pinpoint the errors raised on appeal and to support their contentions with well-reasoned legal argument."); *Diallo v. State*, 413 Md. 678, 692–93 (2010) (arguments that are "not

presented with particularity will not be considered on appeal" (citation and quotations omitted)).

b. The City's Other Arguments Are Not Availing.

The City makes a series of arguments about why the Amended Settlement & Boundary Line Agreement required the City Council's approval for other reasons. It cites *Twigg v. Riverside Apartments, LLC*, 168 Md. App. 351 (2006), *aff'd*, 396 Md. 527 (2007), for the purported proposition that legislative action is required when an agreement runs with the land. According to the City, because the Amended Settlement & Boundary Line Agreement runs with the land, the City Council was required to approve it. And because the agreement was not approved, it is void.

Twigg does not stand for the proposition claimed by the City. In *Twigg*, the Supreme Court of Maryland held that a city mayor lacked the authority to create special assessment fees on behalf of the city and to waive impact fees in two agreements because the General Assembly conferred the authority to levy fees and charges in the legislative body of the municipality, which was required to be undertaken by adopting an ordinance. 396 Md. at 543, 549. Although an agreement in *Twigg* provided that it would "run with the land . . . and . . . be binding upon all future owners," *id.* at 533, the Court did not hold that an agreement containing such language must be approved by legislative action. Instead, the Court held that where the General Assembly specifies how a municipal legislative body must undertake a particular action, the local legislative body must act in accordance with

the statutory directive; otherwise, the action will be deemed invalid and unenforceable. *See id.* at 544, 547–48.

In its reply brief, the City claims that the City Attorney had no authority to enter into the settlement agreement in 2001. By extension, the Mayor had no authority to sign the Amended Settlement & Boundary Line Agreement in 2003, based on the oral settlement agreement that was placed on the record in 2001. Because the 2001 settlement agreement placed on the record was unauthorized, so was the Amended Settlement & Boundary Line Agreement. In addition, the City argues that the agreement was *ultra vires* because it gave away a portion of its waterfront park for no consideration, essentially making the agreement a donative disposition, without statutory authority.

We decline to address these additional arguments because they were not presented in the City's principal brief. The function of a reply brief is to respond to points and issues raised in the appellee's brief. *Oak Crest Vill., Inc. v. Murphy*, 379 Md. 229, 241 (2004). "An appellant is required to articulate and adequately argue all issues the appellant desires the appellate court to consider in the appellant's initial brief." *Id.* "It is impermissible to hold back the main force of an argument to a reply brief and thereby diminish the opportunity of the appellee to respond to it." *Id.* at 241–42.

For the reasons stated, we conclude § 75 of the Charter does not apply to the substance of the municipal action sought to be achieved under the Amended Settlement & Boundary Line Agreement. Therefore, the City Council was not required to approve it.

Accordingly, the court did not err in declaring that the Amended Settlement & Boundary Line Agreement was not *ultra vires* and void *ab initio*.

2.

Access Agreement

We take a different view of the Access Agreement. An "interest" in real estate under the Charter, § 75 includes "any right in the nature of property, but less than title." *Interest*, Black's Law Dictionary, *supra*. Such interest encompasses easements. *See Mercantile-Safe Deposit & Tr. Co.*, 308 Md. at 640 (explaining that "property" clearly encompasses more than a tangible thing; it "extends to easements and other incorporeal hereditaments, which, though without tangible or physical existence, may become the subject of private ownership" (citation omitted)); *Ridgely Condo. Ass'n, Inc. v. Smyrnioudis*, 343 Md. 357, 369 (1996) (explaining that an easement is an interest in property).

An easement is "a non[-]possessory interest in the real property of another." *Gregg Neck Yacht Club, Inc. v. Cnty. Comm'rs of Kent Cnty.*, 137 Md. App. 732, 753 (2001) (alteration in original) (citation omitted). It "involves primarily the privilege of doing a certain class of act on, or to the detriment, of another's land, or a right against another that he refrain from doing a certain class of act on or in connection with his own land[.]" *USA Cartage Leasing, LLC v. Baer*, 202 Md. App. 138, 174 (2011) (citation and quotations omitted). "It can be created expressly or by implication." *Gregg Neck Yacht Club, Inc.*, 137 Md. App. at 753 (citation and quotations omitted).

Easements can be classified as affirmative or negative:

> An affirmative easement authorizes the holder to make active use of the servient estate in a manner that, if no easement existed, would constitute a trespass. Usually an affirmative easement entitles the holder to intrude upon the servient estate. An affirmative easement may also permit the holder to engage in some activity on the holder's own land that disturbs the enjoyment of the servient estate.
>
> * * *
>
> In contrast, a negative easement enables the holder to prevent the owner of the servient estate from doing things the owner would otherwise be entitled to do. A negative easement does not permit the holder to enter or use the servient estate; it limits the right of the servient owner to utilize the servient owner's own land.
>
> * * *
>
> An easement may contain both affirmative and negative features.

Jon W. Bruce et al., *The Law of Easements & Licenses in Land*, § 2:10 Westlaw (database update 2025) (footnotes omitted).

The substance of the municipal action under the Access Agreement, in part, was to grant Ms. Asher and any subsequent owner or tenant of the Property certain rights to the City's real estate. These rights included the City's agreement not to plant trees or install bollards on the City's property in front of any existing gate on the Property and the right to move or remove (and replace) any tree or bollard that the City plants or installs on the City's property along Congress Avenue (Paragraph 3.c.). The agreement also requires the City to make access through its property available to the owner or tenant of the Property during special events (Paragraph 4).

These provisions had the effect of granting an easement that allowed Ms. Asher and her successors in interest to use the City's real estate, inuring to the benefit of future owners and tenants of the Property that ran with the land. *See Ridgely Condo. Ass'n, Inc.*, 343 Md.

at 369–70 (explaining that bylaw amendment revoking commercial unit owner's right to have its clients use the condominium lobby, which was appurtenant to the unit and would be conveyed with the unit, resembled an easement); *Metius v. Julio*, 27 Md. App. 491, 492 & n.1 (1975) (explaining that the parties' agreement that limited the type of development to occur on property created "equitable restrictions" on the property; "restriction[s] upon the use of land . . . are variously termed negative easements, equitable servitudes, or merely equities attached to land . . ."); *Meade v. Dennistone*, 173 Md. 295, 303–04 (1938) (explaining that an agreement among adjoining property owners that restricted the use of land and that ran with and binds the land had the effect of granting an easement). Since the Access Agreement conveyed an "interest" in the City's real estate, and the City Council did not approve it, the agreement was an *ultra vires* act, rendering it void *ab initio*.[10] Accordingly, the court erred in declaring the Access Agreement valid.[11]

[10] The City adds that the Access Agreement gave Ms. Asher and any subsequent owner of the Property a "perpetual right" to keep the fence in place. However, unlike other provisions in the Access Agreement, the provisions relating to the fence were subject to the lease term of fifty years. The City does not further develop this point or cite any legal authority to explain why the provisions regarding the fence that is subject to Lease Agreement amounts to a conveyance of interest in City-owned real estate under § 75 of the Charter. Given the inadequate briefing and our disposition that the Access Agreement is void on other grounds, we do not address this point.

[11] Our holding that the Access Agreement is void *ab initio* bears on our analysis of Count II of the Complaint (Breach of the Access Agreement). *See infra* Section II.F.4.b.

3.

Lease Agreement

a. The Circuit Court Did Not Err in Declaring that the Lease Agreement Was Not *Ultra Vires*.

The municipal action sought to be achieved under the Lease Agreement was for the rental of the area designated as Part C in the Asher Survey to Ms. Asher and her successor in interest for fifty years for $1.00 per year. It is undisputed that the substance of the municipal action is subject to § 76 of the Charter. As stated, § 76 provides:[12]

> The Mayor and City Council shall have the authority to rent or lease any property belonging to the City, for a non-renewable term of fifty (50) years or less. Any such lease shall be approved by the Mayor and City Council by resolution.

The City contends that the Lease Agreement is void for several reasons. In its principal brief, the extent of the City's argument is as follows:

> The Council's approval of the Lease by Resolution 2003-01 did not strictly comply with the City Charter because (1) the [unapproved resolution containing a renewable lease term of 49 years found in the City's records] contained an illegal lease term; (2) the [resolution that the City Council ultimately approved with the 50-year lease term] was attested by the City attorney, not the Director of Administration as required by City Charter 19D; (3) the [resolution that the City Council ultimately approved] was not an official public record because it was not maintained in City files; and (4) both resolutions improperly stated that the Lease was required under the 1998 Settlement Agreement. As a result, the lease is *ultra vires* and *void ab initio*.

[12] In 1999, the City Council passed Charter Amendment Resolution No. 205, which repealed and reenacted § 76 of the Charter regarding the leasing of City property. The resolution cited for authority Article XI–E of the Maryland Constitution, Article 23A of the Annotated Code of Maryland. Havre de Grace, Md., Charter Amendment Resolution No. 205 (Dec. 21, 1999).

The City does not articulate its contention for each point, and it does not cite any legal authority to support it. The Supreme Court of Maryland has advised that it is not an appellate court's task to "rummage in a dark cellar for coal that isn't there," nor is it an appellate court's task to "fashion coherent legal theories to support appellant's sweeping claims." *HNS Dev., LLC v. People's Couns. for Balt. Cnty.*, 425 Md. 436, 459 (2012) (citation and quotations omitted). Because the City has failed to argue any of these points with particularity, as required by Maryland Rule 8-504(a)(6), we will not consider them on appeal. *See Diallo*, 413 Md. at 692–93.

In its reply brief, the City presents additional contentions regarding why the Lease Agreement is void. It argues that the City Council was misinformed about the nature of the settlement between Mr. Asher's estate and the City, leading up to the passing of Resolution 2003-1, which the City contends was apparent because the Whereas Clause of the resolution contained incorrect factual assertions. In addition, the City asserts that the City's authority to convey a municipality's "leasehold property" is an express power granted by the General Assembly under LG § 5-204(c)(3) and therefore, the conveyance of a "leasehold interest" under the Lease Agreement must be accomplished by ordinance and not resolution under *Hovnanian*. None of these arguments were presented in the City's principal brief regarding the validity of the Lease Agreement.[13] Accordingly, we decline to address them. *See Oak Crest Vill., Inc.*, 379 Md. at 241–42.

[13] Moreover, the second argument was not adequately preserved. *See* Md. Rule 8-131(a). In opening statements at trial, the City mentioned that the Lease Agreement was

For the reasons stated, we cannot say that the circuit court erred in concluding that the Lease Agreement was valid and not *ultra vires*.

b. The Circuit Court Did Not Err in Concluding that Paragraph 19 of the Lease Agreement Was Not Ambiguous.

The City argues that the circuit court erred in declaring that Ms. Asher's assignment of the Lease Agreement to 211 Congress did not require the City's approval based on the clear and unambiguous language in Paragraph 19 of the Lease Agreement.

Appellate courts take "an objective approach to contract interpretation, according to which, unless a contract's language is ambiguous, we give effect to that language as written without concern for the subjective intent of the parties at the time of formation." *Ocean Petroleum, Co. v. Yanek*, 416 Md. 74, 86 (2010). "Our task, therefore, when interpreting a contract, is not to discern the actual mindset of the parties at the time of the agreement, but rather, to 'determine from the language of the agreement itself what a reasonable person in the position of the parties would have meant at the time it was effectuated.'" *Dumbarton Improvement Ass'n v. Druid Ridge Cemetery Co.*, 434 Md. 37, 52 (2013) (citation omitted).

Under the objective view of contracts, "a written contract is ambiguous if, when read by a reasonably prudent person, it is susceptible of more than one meaning." *Calomiris*

approved by resolution. The court asked if the City was "contending that the resolution of the lease is not adequate?" and whether that was "going to be an issue in this case." The City responded that "[i]t may be." The court pressed further, "[Y]our position is that it should have been approved by an actual ordinance?" The City responded that it was not "the primary part of our argument." Instead, the City stated that its "primary concern" with the Lease Agreement were the irregularities in the procedure leading up to the City Council's approval of it.

v. Woods, 353 Md. 425, 436 (1999). "The determination of whether language is susceptible of more than one meaning includes a consideration of 'the character of the contract, its purpose, and the facts and circumstances of the parties at the time of execution.'" *Id.* (citation omitted).

The language in Paragraph 19 of the Lease Agreement is clear. Subsection 19(a) provides that the tenant (Ms. Asher) shall not assign or sublease the lease of Part C without first obtaining the prior written consent of the landlord (the City):

> (a) Tenant shall not make or permit an assignment or sublease of this Lease or any interest herein, in whole or in part, by operation of law or otherwise, without first obtaining in each and every instance the prior written consent of Landlord. Landlord has the absolute right to deny Tenant permission to assign or sublet this Lease for any reason or for no reason, which consent shall be in the Landlord's sole discretion.

Subsection 19(b) provides:

> (b) *Notwithstanding the foregoing subsection 19(a)*, it is understood and agreed that this Lease shall run with the land and shall bind and inure to the benefit of Landlord and Tenant and any subsequent owner of all or any portion of the Property adjacent to the Premises, including any owner of a lot created by subdivision of the Property and/or the owner of any lot or unit in a condominium regime or townhouse association which may be formed in connection with all or any portion of the Property adjacent to the Premises.

(emphasis added).

The City contends that subsection 19(b) created ambiguity in its absolute right to approve assignments under subsection 19(a). We disagree. The language in subsections 19(a) and (b) when read together is susceptible of only one meaning: if the owner of the Property wishes to assign the Lease Agreement to one who is *not* a "subsequent owner of all or any portion of the Property . . . ," the owner must first obtain written consent from

the City to do so. However, if the owner of the Property conveys it to a subsequent owner, the subsequent owner would receive the benefit of the Lease Agreement without having to first obtain consent from the City. *See Notwithstanding*, Black's Law Dictionary (7th ed. 1999) (the word "notwithstanding" means "[d]espite; in spite of").

In addition, the City contends the phrase "run with the land" under subsection 19(b) is ambiguous and susceptible to more than one meaning. Again, we disagree. This language clearly expresses the intention for the Lease Agreement to transfer automatically to the subsequent owner of the Property. This intent is also evident in Paragraph 31 ("This Lease shall run with the land and shall bind and inure to the benefit of the Tenant and any subsequent owner" of the Property).

In its reply brief, the City adds other contentions not raised in its principal brief. It argues that subsection 19(b) is ambiguous because of the "character" of the Lease Agreement, the circumstances surrounding the City Council's approval of the Lease Agreement, and the fact that no other City leases contain the phrase "run with the land." Again, because these arguments were not raised in the City's principal brief, we will not address them. *See Oak Crest Vill., Inc.*, 379 Md. at 241–42.

Finally, the City cites "parol evidence" that Mr. Brandon sought the City's approval to have the Lease Agreement assigned to 211 Congress when it purchased the Property in 2014. To the extent the City cites this evidence to support its contention that Paragraph 19 is ambiguous, the argument is unavailing. Our task is to consider the language in Paragraph 19 to ascertain its meaning, and it is improper to consider extrinsic evidence to determine

whether the language is ambiguous. *See Calomiris*, 353 Md. at 447 (holding that, where a provision in a mortgage contract was unambiguous, the court erred in awarding summary judgment based on extrinsic evidence to interpret the provision). In any event, because we conclude that Paragraph 19 is unambiguous, we need not consider extrinsic evidence. *See, e.g.*, *Wilkinson v. Bd. of Cnty. Comm'rs of St. Mary's Cnty.*, 255 Md. App. 213, 241 n.10 (2022); *Sierra Club v. Dominion Cove Point LNG, L.P.*, 216 Md. App. 322, 343 (2014) (explaining that there was no need to address the appellant's argument about extrinsic evidence since we already concluded that the agreement was unambiguous).[14]

For the reasons stated, the circuit court did not err in concluding that the Lease Agreement is not ambiguous and that the assignment of the Lease Agreement from Ms. Asher to 211 Congress did not require the City's prior approval.

4.

211 Congress's Claims for Breach of the Lease Agreement and Access Agreement

As mentioned, the circuit court denied the relief requested by 211 Congress in Count I of the Complaint (Breach of the Lease Agreement) and Count II (Breach of the Access Agreement). The record sheds light on the court's reasoning for its decisions about these

[14] Even if the language in Paragraph 19 is ambiguous and extrinsic evidence of post-contract conduct can be considered, a court must determine the intention of the parties *who made the contract*. *See Canaras v. Lift Truck Servs., Inc.*, 272 Md. 337, 352 (1974) ("The court in interpreting a contract places itself in the same situation as *the parties who made the contract*[.]" (emphasis added)). Mr. Brandon did not participate in negotiating the Lease Agreement, so his conduct years after the execution of the Lease Agreement is not extrinsic evidence.

claims. During 211 Congress's closing statement, the court pointed out that the entity, 211 Congress, was separate from Mr. Brandon, the individual:

> [COUNSEL FOR 211 CONGRESS]: Here the subject matter of this lease, the whole point of this lease is to give Mr. Brandon through his company, 211 Congress --
>
> THE COURT: I'm going to stop you there. The lease is with 211 Congress.
>
> [COUNSEL FOR 211 CONGRESS]: Yes.
>
> THE COURT: It's not with Mr. Brandon as a person. *What evidence has been presented that the quiet enjoyment or access of the entity 211 Congress has been interfered with?*
>
> [COUNSEL FOR 211 CONGRESS]: Well, Mr. Brandon testified, I believe, that the access in gate 4 and to some extent gate 2 is impacted, first of all, by the location of the tent, and his ability to determine what -- and I say "his," I mean 211 Congress -- that entity's ability to determine what to do with that property.
>
> THE COURT: *What business exercise are they carrying on on this empty lot which only has a shed with some boats in it?*
>
> [COUNSEL FOR 211 CONGRESS]: *Well, they haven't done any yet. That's true.* That's the testimony. But I think that Mr. Brandon's testimony was that entity has not been able to develop a plan for this [P]roperty because of the difficulties with access. So yeah, I mean, it would add 211's ability to have access, including construction equipment, which he said he could not get into through either gate 3 or gate 4 because of the tent. They can't develop the [P]roperty. And the same applies --
>
> THE COURT: Well, he has no permit to develop the [P]roperty at this time.

(emphasis added).

Counsel for 211 Congress acknowledged that neither Mr. Brandon nor 211 Congress currently had a permit or authority to develop the Property. Counsel explained that the City had passed an ordinance that bars the Planning Department from issuing permits if the applicant is in litigation with the City. Thus, 211 Congress could not develop the Property. The court confirmed that the Property was undeveloped:

> THE COURT: *But the status as of today, as the [c]ourt sits here and decides the case, the [P]roperty is undeveloped*.
>
> [COUNSEL FOR 211 CONGRESS]: It is undeveloped. That's true.

(emphasis added).

Later, during closing statements, the court again inquired about the distinction between the entity, 211 Congress, and Mr. Brandon, the individual:

> THE COURT: What is the evidence that the entity 211 Congress has been interfered with in the exercise of its rights?
>
> [COUNSEL FOR 211 CONGRESS]: Well, Your Honor, the evidence shows that on --
>
> THE COURT: There's no business being operated by 211 Congress on that property. It's basically unoccupied property with a boat shed. That's what's there.
>
> [COUNSEL FOR 211 CONGRESS]: Yes, Your Honor.
>
> THE COURT: *There's no evidence I have in the record that 211 Congress conducts any type of business on that property. So how is it possibly interfered with?*
>
> [COUNSEL FOR 211 CONGRESS]: Well, Your Honor, the access is clearly being interfered with on dozens of occasions over the past few years the City has closed off that intersection.
>
> THE COURT: *Yeah, but there's no evidence that any official of 211 Congress, trying to perform some function for that business entity, couldn't get on the property.*
>
> [COUNSEL FOR 211 CONGRESS]: Well, Your Honor, I think it's more specific to the fact that if Mr. Brandon as the princip[al] of 211 Congress --
>
> THE COURT: Yeah, but he's separate . . . . It's 211 Congress who's involved in this action.
>
> [COUNSEL FOR 211 CONGRESS]: I don't disagree with Your Honor. I would say, and I think it's important to note, that as the principal of 211 Congress --
>
> THE COURT: He may well be but it's a separate entity established by law.

> [COUNSEL FOR 211 CONGRESS]: Yes, Your Honor. I'm not disagreeing with you, but as a principal, if he thinks he cannot get in to access this property --
>
> THE COURT: *There's no evidence as principal he wanted access to the property to perform some business purpose of behalf of 211 Congress*. . . . *The only evidence and testimony I heard was, which I was sympathetic to, was he had a handicapped member of his family who wanted to go watch the fireworks. But that seemed to be personal to him. And also he was trying to move a boat. But that was, as far as I could tell, his own personal boat*.
>
> [COUNSEL FOR 211 CONGRESS]: *Yes, Your Honor, it was his own personal boat*. But again, Your Honor, I think as the principal he knows whether or not -- what steps he needs to take to develop this property. If he thinks he cannot even get access during any special events, then he has no ability to plan ahead, no ability to develop, no ability to trust the City to abide by [the Access Agreement. . . .]

(emphasis added).

In the end, the court denied 211 Congress's claims under Counts I of the Complaint (Breach of Quiet Enjoyment under the Lease Agreement) and II (Breach of the Access Agreement). In its oral ruling, the court explained:

> Again, and this one I've said before, I'm entering judgment in favor of the [City] because I don't find that 211 Congress, LLC as an entity has established any breach of contract or quiet enjoyment or access. There's been no evidence at trial that suggested 211 Congress has attempted to carry on any business activity on this unoccupied property. All that's there is a shed with a boat which apparently belonged to Mr. Brandon as an individual. So I don't find there's been any substantial interference with the business entity of 211 Congress, LLC.

The court's written order denied the relief requested by 211 Congress under Counts I and II of the Complaint, stating that "no justiciable issue" existed because 211 Congress "failed to demonstrate [that] it had attempted to use 211 Congress Avenue."

On appeal, 211 Congress focuses on the language in the written order and argues that the court erred in concluding that no justiciable controversy existed regarding 211 Congress's claims for breach of the Lease Agreement and Access Agreement. It explains that it asserted breach of contract claims upon a state of facts that accrued, for which it sought and demanded a legal decision.

In addition, it argues that the court "set too high a bar" on the justiciable nature of its breach of contract claims when the evidence demonstrated that the City's events interfered with 211 Congress's right to quiet enjoyment and access to its property. 211 Congress explains that the evidence established that Mr. Brandon's access to some of the gates on the Property was blocked, and access was required for development and construction. It interprets the court's order to mean that 211 Congress had to develop the Property before the court would find in its favor on the breach of contract claims, which is unsupported by law.

a. The Circuit Court Did Not Err in Denying the Relief Requested Under Count I of the Complaint (Breach of the Lease Agreement).

"A controversy is justiciable when there are interested parties asserting adverse claims upon a state of facts which must have accrued wherein a legal decision is sought or demanded." *Reyes v. Prince George's Cnty.*, 281 Md. 279, 288 (1977) (citations omitted). The interested party requirement is that the plaintiff must have standing to seek the requested relief. *See id.* It is unclear whether the court's use of the phrase "no justiciable issue" refers to a determination of justiciability and the related doctrine of standing, or if the court was using those words colloquially to indicate that 211 Congress had not met its

burden of proving the breach of the quiet enjoyment provision in the Lease Agreement. Based on our review of the record, we think the court's reasoning suggests that 211 Congress did not meet its burden of proof, as there was no evidence that it, as an entity, experienced any interference with its rights under the Lease Agreement.

"[T]he rights and responsibilities of the [entity] are separate and distinct" from those of its owner. *Norman v. Borison*, 192 Md. App. 405, 422 (2010). The trial testimony regarding the interference with quiet enjoyment related to Mr. Brandon's inability to enter the Property to retrieve his personal boat and watch fireworks with his friends and family; such interferences were personal to him and unrelated to 211 Congress, the entity.

We disagree with 211 Congress's interpretation of the court's decision to mean that it had to engage in a futile effort to develop the Property before the court could grant relief under its breach of contract claim. The court's remarks during closing statements emphasized that the evidence showed the City affected Mr. Brandon's attempts to engage in activities for his personal use or enjoyment, rather than his attempts to perform tasks related to the business of 211 Congress. As the court explained, there was no evidence that, as an entity, 211 Congress's right to quiet enjoyment was interfered with. For the reasons stated, the court did not err in denying Count I of the Complaint.

b. The Circuit Court Did Not Err in Denying the Relief Requested Under Count II of the Complaint (Breach of the Access Agreement).

We conclude that the circuit court did not err in denying the relief requested under Count II of the Complaint (Breach of the Access Agreement), albeit for a different reason. As we previously concluded, the Access Agreement conveyed an interest in City-owned

real estate, which required approval by the City Council under § 75 of the Charter. Because that did not occur, the Access Agreement was void. It follows that there can be no breach of an invalid contract. *See James B. Nutter & Co. v. Black*, 225 Md. App. 1, 12 (2015) ("A void contract is not a contract at all . . . and all parties, present and future, would be equally allowed to avoid the contract." (citations and quotations omitted)); *Daugherty v. Kessler*, 264 Md. 281, 285 (1972) ("[U]sually the word void means . . . unenforceable between the parties.").

III.

ZONING SETBACK EXEMPTION

Section 205-3(E) of the City's Zoning Code provides that lots created by deeds recorded in the land records before March 15, 1982, are exempt from the City's setback requirements for residential lots.[15] In pertinent part, this subsection states:

> Single-family detached dwellings, which have been or may be constructed *on lots created by virtue of deeds or of subdivision plats recorded in the land records* of Harford County *prior to March 15, 1982*, shall be exempt from the single-family, residential lot specifications contained in Table I of this chapter.

§ 205-3(E) (2019) (emphasis added). This subsection was intended to be a grandfather provision that would exempt certain downtown lots from the setback requirements, allowing for the construction of single-family residences on lots that would otherwise be too small and narrow.

[15] According to the City, the applicable setback requirements during the relevant time were generally fifteen feet in the front yard, five feet in the side yard, and about twenty-five feet in the rear yard.

The City employed a "snapshot in time" approach to determine whether a lot qualified for the zoning setback exemption. Under this approach, the City examined a specific point in time, based on land records recorded before and after March 15, 1982. According to Shane Grimm, the Director of Planning for the City, § 205-3(E) has been interpreted by the City to mean that if a lot was recorded in the land records before March 15, 1982, but was subdivided after that date, it would not qualify for the setback exemption. Similarly, a lot would not be considered exempt if it was recorded in the land records prior to March 15, 1982, but was "added to" after that date. The second scenario is at play in this case.

As stated, in Count III of the Counterclaim, the City sought a declaration that under § 205-3(E), the setback exemption does not apply to the Property. To support this claim, the City compared the Property's description in the deed recorded in the land records prior to March 15, 1982, with its description in other documents filed in the land records after that date.

The last recorded deed that described the Property before March 15, 1982, was the Asher deed, recorded in 1962. This deed describes the property as follows:

> Beginning for the same at a pipe on the northerly side of Congress Avenue, said pipe being East 170 feet from the corner formed by the intersection of the easterly side of St. John Street with the northerly side of Congress Avenue; and running thence binding on the northerly side of Congress Avenue East 431.48 feet to a pipe; continuing East 30 feet, more or less, *to the water of the Susquehanna River*; thence with said river in a northwesterly direction 115 feet, more or less; thence leaving said river West 52 feet more or less to a pipe; continuing West 313.73 feet to a pipe, South 60 feet to the point of beginning.

(emphasis added). The deed describes the area as "[c]ontaining 0.57 acre, more or less[.]"

As explained in Section II.A *supra*, the Asher Survey was completed in connection with the Amended Settlement & Boundary Line Agreement and recorded in the land records in 2003. It referred to the Property described in the original deed as Part A and confirmed that the original lot covered 0.5693 acres, or 24,801 square feet. In addition, the Asher Survey designated Part B of the Property as an area "added by fill," indicating it was created by artificial fill. This area spans 0.1097 acres, or 4,778 square feet. *See supra* Section II.A. It is unclear when this area identified in Part B developed because the only documentation of its existence is contained in the Asher Survey recorded in 2003.

The question becomes: Does the setback exemption apply only to Part A, the area described in the Asher deed and recorded in the land records *before* March 15, 1982, or does it also apply to Part B, the area that was "added to" the Property as shown in the Asher Survey recorded *after* March 15, 1982?

A.

211 Congress's Motion for Summary Judgment

211 Congress moved for summary judgment on Count III of the Counterclaim. On August 20, 2020, about a year before trial, the circuit court held a hearing. 211 Congress argued that there was no dispute of material fact that the Property was a lot created by virtue of a deed recorded prior to March 15, 1982, under § 205-3(E). The Asher deed specified that the eastern boundary of the property extends to the Susquehanna River. As a riparian landowner, Mr. Asher, as well as subsequent owners of the Property, held riparian

rights, which include the right to any land that may form through the process of accretion. *See Bd. of Pub. Works v. Larmar Corp.*, 262 Md. 24, 36–37 (1971) (explaining that such right to land surfacing through accretion ensures that the riparian owner would never be cut off from their access to water).

The City did not dispute that, according to the Asher deed, the eastern boundary of the Property extends to the shore of the Susquehanna River. It also did not dispute that the Ashers, and, by extension, 211 Congress as the subsequent purchaser, owned the accreted land in Part B as part of their riparian rights. However, the City argued that the issue of ownership was distinct from the issue of whether part or all of the Property was subject to the setback requirements.

Using its "snapshot in time" approach, the City confirmed that Part A was subject to the setback exemption. Therefore, if 211 Congress wanted to build a structure on Part A that did not extend to Part B, then Part A would not be subject to the setback requirements.

In contrast, the accretion reflected in Part B was not documented in any land records prior to March 15, 1982; rather, it was only described in the Asher Survey, which was recorded long after that date. The City argued that to ensure the accretion qualified for the setback exemption, a riparian owner must file a document in the land records demonstrating that their lot had increased in size before March 15, 1982, as other landowners in the community had done.

According to the City, since the Asher Survey was a "post March 15, 1982" document showing the existence of an additional area designated as Part B, Part B could

not qualify for the setback exemption. Therefore, if 211 Congress wanted to build a structure on Part A that extended to Part B, the structure would be subject to the setback requirements.

In response, 211 Congress argued that the Zoning Code did not require a riparian landowner to record a new plat to reflect accretions. Rather, because § 205-3(E) exempted lots created by virtue of deeds recorded prior to March 15, 1982, and the Property was created by the Asher deed prior to that date, the entire lot (that is, Parts A *and* B) was exempt from the setback requirement. 211 Congress contended that the "snapshot in time" approach was not supported by the language of § 205-3(E) and that the City was adding requirements to the provision that did not exist.

B.

Circuit Court's Ruling

At the conclusion of the hearing, the circuit court granted 211 Congress's motion for summary judgment on Count III of the Counterclaim. On January 16, 2021, the court entered a declaratory judgment on Count III of the Counterclaim, declaring that (1) the Property was a lot created by virtue of the Asher deed, recorded in the land records for Harford County prior to March 15, 1982; (2) due to riparian rights, the boundaries of the Property included any land added by accretion or fill along the Susquehanna River; (3) nothing in the law obligated the Ashers to submit any additional description or plat of the Property prior to March 15, 1982 in order to ensure that any such land added by accretion or fill was exempted from setback requirements for single-family detached dwellings under

§ 205-3(E) of the Zoning Code; and (4) therefore, the entire Property was exempt from residential setback requirements under § 205-3(E).

C.

The Circuit Court Did Not Err in Granting Summary Judgment.

On appeal, the City argues that the circuit court erred in granting summary judgment on Count III of its Counterclaim. It contends that although there may not have been any requirement to record updates regarding parcel dimensions to maintain the setback exemption, there was no evidence that the accretion reflected in Part B of the Asher Survey existed before March 15, 1982. The City continues to maintain that the Zoning Code supports its "snapshot in time" approach. It explains that to determine whether the Property is eligible for the setback exemption, the City needs only to consider the lots as they are described in the land records prior to March 15, 1982. According to the City, if accretion occurs and the increased dimensions of the land are documented in an instrument recorded in the land records after March 15, 1982, then this additional area would not qualify for the setback exemption. Therefore, the City argues, the language under § 205-3(E) does not support 211 Congress's assertion that the area described as Part B in the Asher Survey is eligible for the setback exemption.

"Our standard of review of the declaratory judgment entered as the result of the grant of a motion for summary judgment is whether that declaration was correct as a matter of law." *S. Easton Neighborhood Ass'n v. Town of Easton*, 387 Md. 468, 487 (2005). The issue before us is one of statutory interpretation. We will apply the same principles of

statutory construction to the City's Zoning Code as are required in the interpretation of any statute or regulation. *See Harford Cnty. People's Couns. v. Bel Air Realty Assocs. Ltd. P'ship*, 148 Md. App. 244, 259 (2002).

Section 205-3(E) clearly provides that the setback exemption applies to "*lots created by virtue of deeds* or of subdivision plats *recorded* in the land records of Harford County *prior to March 15, 1982*." (emphasis added). The City does not dispute that riparian landowners have rights to land that emerges through the process of accretion. Nor does the City dispute that the Asher deed specifies that the eastern boundary of the property extends to the shore of the Susquehanna River.

We conclude that the accreted land referenced in Part B of the Asher Survey is exempt from the setback requirements because it is part of a lot created by virtue of a deed recorded prior to March 15, 1982. The lot in question was created by the Asher deed, which was recorded in the land records of Harford County before March 15, 1982. Under fundamental principles of riparian law, the land identified in the Asher Survey as Part B is part of the same lot described in the Asher deed, i.e., Part A. Consequently, the property located at 211 Congress, including any land formed through the process of accretion, is exempt from the setback requirements under § 205-3(E).

The City would have us read § 205-3(E) as if it were written as follows:

> Single-family detached dwellings, which have been or may be constructed on lots created by virtue of deeds or of subdivision plats recorded in the land records of Harford County prior to March 15, 1982, shall be exempt from the single-family, residential lot specifications contained in Table I of this chapter. *Notwithstanding the above, if any such lot was added through accretion, and the accreted land is not depicted in an instrument recorded in*

> *the land records prior to March 15, 1982, such accreted land shall not be exempt from the aforementioned lot specifications*.

We decline to adopt such a reading since that would vary the plainly expressed intention of the City Council. *See Harford Cnty. v. McDonough*, 74 Md. App. 119, 124 (1988) ("[W]e may not rewrite the statute by inserting or omitting words therein to make the legislation express an intention not evidenced in its original form[.]"). For the reasons stated, the circuit court did not err in granting summary judgment on Count III of the Counterclaim in favor of 211 Congress.

JUDGMENT OF THE CIRCUIT COURT FOR HARFORD COUNTY AFFIRMED IN PART, REVERSED IN PART, AND VACATED IN PART AS TO COUNT IV OF THE AMENDED COMPLAINT (PRIVATE NUISANCE) AND REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION; JUDGMENT AFFIRMED IN PART AND REVERSED IN PART AS TO COUNT V OF THE SECOND AMENDED COUNTERCLAIM (AMENDED SETTLEMENT & BOUNDARY LINE AGREEMENT AND ACCESS AGREEMENT) WITH INSTRUCTIONS TO DECLARE THAT THE ACCESS AGREEMENT WAS AN *ULTRA VIRES* ACT AND THUS VOID *AB INITIO*; THE REMAINING JUDGMENTS OTHERWISE AFFIRMED. COSTS TO BE DIVIDED AS FOLLOWS: 70% OF COSTS TO BE PAID BY APPELLANT MAYOR & CITY COUNCIL OF HAVRE DE GRACE; 20% OF COSTS TO BE PAID BY APPELLEE 211 CONGRESS, LLC; 10% OF COSTS TO BE PAID BY APPELLEES BARBARA AND GARY PENSELL.